Carleton College *and* Karl Diekman. Case 18–CA–14336

April 30, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On November 13, 1997, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Carleton College, Northfield, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER BRAME, concurring.

Although I agree with my colleagues and the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to extend a contract to adjunct professor Karl Diekman because of Diekman's union activities, I reach this conclusion for the reasons stated below.

The Respondent employed Diekman as an adjunct professor of clarinet and saxophone from 1983 until 1996. During the spring of 1995,[1] Diekman and Eric Kodner, an adjunct professor of trench horn, formed an ad hoc adjunct faculty committee. The committee, which also included adjunct professor Lynn Deichert, conducted a survey of other adjunct faculty members seeking their opinions on working conditions. The ad hoc committee represented by Diekman, Kodner, and Deichert presented the concerns that the adjunct faculty raised in the survey at a regular faculty meeting on June 1. The members sought increased compensation and travel pay, the opportunity to negotiate the terms of annual teaching contracts and to attend music department meetings, and the chance to provide input into the music department curriculum. Stephen Kelly, who served as co-chair or chair of the Respondent's music department at all relevant times here, responded by expressing his concern about the economic effects on the applied music program if adjunct faculty were to unionize.

When the next school year began that fall, the ad hoc committee decided to call itself The Adjunct Faculty Committee (TAFC) and conducted an election, with Diekman, Kodner, Deichert, Jim Hamilton, and Elizabeth Ericksen being elected TAFC's officers.[2] Kelly then formed a separate adjunct faculty committee called the Adjunct Faculty Concerns Committee (AFCC) and held an election for officers at about the same time as the TAFC election. In a subsequent memorandum dated October 26, Kelly notified the adjunct faculty of the AFCC election results, labeled TAFC as a "non-Departmental Committee," and claimed, contrary to the credited evidence, that he was unaware of the TAFC election. In response, on October 30, TAFC sent a letter to Kelly protesting, inter alla, his "dismissive" characterization of TAFC.

After the Respondent failed to make the improvements in working conditions that TAFC had sought, TAFC sent a 28-page memorandum in early March 1996[3] to the Faculty Affairs Committee (FAC), which adjusts faculty grievances, complaining about terms and conditions of employment for adjunct faculty in the music department. The judge set out the details of that memorandum at section I,E of his decision and he found that the memorandum was protected activity under the Act at section II,A of his decision. On March 8, Kelly reacted to TAFC's memorandum by sending a handwritten note to Elizabeth McKinsey, the Respondent's dean of the college, stating that: "this memorandum represents a few good points surrounded by a sea of misinformation, vague charges, and red herrings. I assume FAC will not want to waste its and my valuable time with a response." Furthermore, McKinsey later complained that TAFC's memorandum contained "many overstatements and misstatements concerning the music department and its leadership that were inflammatory and unsupported by the evidence."

Against this background, Kelly sent a memorandum to McKinsey, on July 17, recommending that she take disciplinary action against Diekman, Deichert, and Kodner. Kelly stressed that all three had written the lengthy memorandum to FAC, dated February 27 and sent in early March, and signed Hamilton's name to TAFC's letter to him of October 30, 1995, that Hamilton had denied approving. Additionally, Kelly complained that Diekman had told two faculty members that he intended

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In adopting the judge's finding that the Respondent's refusal to extend a contract to adjunct professor Karl Diekman violated Sec. 8(a)(3) and (1) of the Act, we do not rely on the judge's statement that Diekman's threat to withhold reporting students' grades was akin to a sit-down strike or plant takeover.

[1] All dates are in 1995, until otherwise indicated.

[2] Ericksen apparently decided not to serve on TAFC's committee and was not replaced.

[3] All subsequent dates are in 1996, unless otherwise noted.

to prevent Hector Valdivia, another faculty member, from gaining tenure, had complained to students about both Valdivia in particular and the music department generally, and had threatened to withhold reporting students' grades if he did not receive his mileage payment. Regarding Kodner, Kelly stated that Kodner's complaints to students about the music department were another basis for disciplining Kodner. Significantly, Kelly cited no other misconduct by Deichert besides his participation in TAFC activities.

Rather than discipline the three adjunct faculty members, McKinsey decided "to try to rectify the situation and move on from here and get some assurance of professional behavior." Therefore, the Respondent contacted the three of them for individual meetings with McKinsey and Kelly before the 1996–1997 academic year began. These meetings, as the judge found, were unprecedented in that the Respondent's practice did not involve interviewing adjunct faculty before renewing their contracts and, more importantly, constituted the basis for the Respondent's decision on whether to renew the contracts of Diekman, Deichert, and Kodner.

The first meeting was with Deichert and, although the evidence concerning it is scant, that meeting apparently ended cordially as the Respondent tendered him a contract for the new academic year. During the meeting with Kodner, the Respondent's officials questioned him about TAFC's memorandum to FAC complaining about working conditions. Kodner responded that the document was a case of "too many cooks" and that TAFC was trying to get attention without understanding the process. He later added that, "But at this point I'd like to take the fuse out of the bomb. There've been mistakes on both sides . . . if there are sides." The Respondent, as the meeting ended, also gave Kodner a contract for the new academic year.

Diekman's meeting on September 5, by contrast, did not result in the Respondent tendering him the new contract that Kelly had brought to the meeting. When the Respondent raised the subject of the TAFC memoranda Kelly had complained about to McKinsey, Diekman refused to make any commitment to refrain from such activities in the future. Instead, Diekman became argummentative and sidestepped McKinsey's concerns about his professionalism and his obligations to the music department.

Thus, although Kelly had brought Diekman's 1996–1997 contract to the meeting with Diekman, McKinsey decided on September 6, after consulting with Kelly under Kelly's version of the decisionmaking process, not to tender Diekman a contract for the new academic year. McKinsey then sent Diekman a letter, dated September 9, that confirmed this decision and relied on the five subjects that Kelly had listed in his July 17 memorandum recommending the discipline of Diekman as a basis for the Respondent's termination of Diekman's employment.[4] Therefore, McKinsey's letter specifically referenced, as had Kelly in his earlier memorandum, both TAFC's October 30 letter to Kelly and its lengthy March 1996 memorandum to FAC as being significant factors in the decision to sever the employment relationship.

In short, the Respondent held an unprecedented meeting with these adjunct faculty members before offering renewal contracts to them. Each of the three was an active TAFC official, and a principal part of the discussion at these meetings related to these members' TAFC activities. It is thus clear that the Respondent would not have held these individual meetings with the TAFC officials in the absence of their union activities. When Diekman, unlike Deichert and Kodner, resisted the Respondent's demand that he abandon or modify his TAFC activities, the Respondent refused to extend him a contract for the new academic year. Indeed, the letter that McKinsey sent to Diekman on September 9 confirming the Respondent's decision to deny him a renewal contract specifically included Diekman's TAFC activities as a significant part of the reason for the Respondent's decisions.[5] As the judge found, both TAFC's October 30, 1995 letter to Kelly and its lengthy memorandum to FAC complaining, respectively, about Kelly's "dismissive" characterization of TAFC and working conditions generally for adjunct professors constituted protected concerted actvities within the meaning of the Act. By including these reasons in its September 9 letter to Diekman, the Respondent itself has indicated that Diekman's contract was not renewed because of his protected concerted activities.[6] Thus, I adopt the judge's finding that Diekman's

[4] The letter, in pertinent part, lists five "specific actions [Diekman] took last year that undermined our program" as follows: "(1) You made comments to two faculty members that you intended to work against Hector Valdivia's tenure, to work to 'get rid' of him. (2) You complained to students about Professor Valdivia and about the department; I have documentation from last spring that two students experienced such complaints from you. (3) A letter dated October 30, 1995, was sent to Professor Steve Kelly with four names attached: yours, Eric Kodner's, Lynn Deichert's, and Jim Hamilton's. You, Eric and Lynn accepted responsibility for the letter, but I received a signed statement from Jim Hamilton that he nether signed nor approved this letter. (4) You issued a threat on March 13, 1996, to your department chair to withhold student grades because you were informed by the business office that computer problems might delay your usual mileage payments. (5) You and two others wrote a complaint to the Faculty Affairs Committee, dated Feb. 27, 1996, in which you knowingly included many overstatements and misstatements concerning the music department and its leadership that were inflammatory and unsupported by evidence."

[5] As stated, these TAFC activities were the only grounds that Kelly had relied on in his July 17 memorandum to McKinsey recommending that the Respondent discipline TAFC member Deichert, in addition to Diekman and Kodner.

[6] See generally *NLRB v. So-White Freight Lines*, 969 F.2d 401 (7th Cir.1992), enfg. 301 NLRB 223 (1992) (violation found in discipline of employee where action was motivated by, inter alia, employee's protected concerted activities in presenting list of driver concerns to management), *Red Ball Motor Freight v. NLRB*, 660 F.2d 626 (5th Cir.1981), enfg. 253 NLRB 871 (1980) (employee unlawfully dis-

protected concerted activities were a motivating factor in the Respondent's action toward him. Because the Respondent relied on clearly unlawful reasons, in addition to potentially legitimate grounds, in its letter declining to renew Diekman's contract, I also agree with the judge that the Respondent has failed to establish under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*, 462 U.S. 393 (1983), that it would have taken this action if Diekman had not engaged in TAFC activities.[7] For these reasons, I join my colleagues in finding that the Respondent's refusal to extend a contract to Diekman violated Section 8(a)(3) of the Act.

Pamela W. Scott, for the General Counsel.
Daniel G. Wilczek (Faegre & Benson), of Minneapolis, Minnesota, for the Respondent.
Jill Clark, of Minneapolis, Minnesota, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge: I heard this case in Minneapolis, Minnesota, from May 19 through 21, 1997. On April 2, 1997, the Acting Regional Director for Region 18 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing, based upon an unfair labor practice charge filed on January 16, 1997, alleging violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based upon the entire record, upon the briefs which were filed, and upon my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICE

A. Introduction

The ultimate issue in this factually involved case is the motivation for a refusal to renew an adjunct faculty instructor's contract for the 19961997 academic year. The General Counsel alleges that the actual motivation had been because that instructor engaged in union and other activity protected by Section 7 of the Act. That allegation is denied and, instead, the Employer contends that the actual reasons had been the instructor's refusal to promise not to engage during that academic year in activity which is beyond the protection of the Act and, as well, the purportedly improper statements made by that instructor in the course of refusing to promise not to engage in that activity.

Absent an admission of unlawful motivation, *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966), the methodology for resolving motivation issues is that set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), as modified in *Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276–278 (1994). That is, the General Counsel bears the burden of establishing that antiunion animus motivated the employer's action. *Rose Hills Co.*, 324 NLRB 406, 407 fn. 4 (Sept. 22, 1997). See *Schaeff Inc. v. NLRB*, 113 F.3d 264 fn. 5 (D.C. Cir. 1997).

In turn, "[t]he employer may escape liability for its action either by . . . disproving one or more of the critical elements of [the General Counsel's] case, or by establishing as an affirmative defense that it would have taken the same action even in the absence of the employee's protected conduct." *TNT Skypak, Inc.*, 312 NLRB 1009, 1010 (1993). Although that analytical methodology appears relatively straightforward, its application in the instant case requires review of a number of facts from several areas.

Carleton College (Respondent) is a Minnesota corporation with its office and campus place of business in Northfield, Minnesota, where it operates a private nonprofit liberal arts college engaged in educating students and awarding undergraduate degrees.[1] Approximately 1800 students are enrolled at Respondent. Its chief academic officer, the person who is the ultimate supervisor of all academic faculty and who possesses ultimate authority for making decisions relating to discipline and discharge of faculty members, is the dean of the college. At all times material to this proceeding that has been Elizabeth McKinsey, an admitted statutory supervisor and agent of Respondent.

Mentioned during the events which have led to his proceeding are two collegewide level, as opposed to departmental level, committees. The first is the faculty affairs committee (the FAC). It consists of faculty members. Professor Charles Carlin, a member of that committee for 3 years and, by September 1996, president of the faculty, described the FAC "as a hearing board. We hear grievances. We handle things that are relevant to the well being of the faculty in general and serve as a conduit between the administration and the faculty." In short, the FAC is a component of Respondent's internal disputes resolution procedure. During the winter and spring of 1996 the chair of the FAC was Professor James E. Finholt. There is no allegation that, while serving in that capacity, Finholt had been either a statutory supervisor or agent of Respondent. Nor, for that matter, is it alleged that Carlin had been either a statutory

charged for complaining about employment practices that were unfavorable to employees).

[7] In so concluding, I stress that in this case the Respondent neither acted to terminate the September 5 meeting with Diekman on the ground that he demonstrated his unwillingness to work together with the Respondent's management nor justified the nonrenewal of Diekman's teaching contract exclusively on grounds that were not discriminatory. Although Diekman's conduct during his September 5 meeting with McKinsey and Kelly was not the model of decorum, I agree with the judge at sec. Il,(c) of his decision that nothing Diekman said was so egregious that he no longer was entitled to the protections of the Act. See generally J. *P. Stevens & Co. v. NLRB,* 547 F.2d 792 (4th Cir. 1976), enfg. 219 NLRB 850 (1975) (court found employee's discharge unlawful even though employee disrupted employer's antiunion meeting by insisting on obtaining answer to question which another employee had asked; court found no violation, however, when the employer discharged 22 employees who persisted in planned conduct calculated to disrupt employer's antiunion meeting).

[1] Respondent admits that at all material times it has been engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, based upon the admitted allegations that, in the course of its operations during calendar year 1996, it received gross revenues in excess of $1 million dollars, of which at least $50,000 was received from points outside the State of Minnesota.

supervisor or agent of Respondent while serving as a member of that committee or as president of the faculty.

The other committee is the faculty personnel committee. It consists of five tenured faculty members, each elected for a 3-year term, along with Respondent's president and the dean of the college serving ex officio. This is the committee which evaluates tenure-track faculty members who are seeking to achieve tenure at Respondent.

Candidates for tenure are evaluated in the sixth year of their employment by Respondent. However, a third-year or formative review is conduct by the faculty personnel committee. According to Classical Languages Professor Jackson Bryce, who was serving his second year on that committee at the time of the hearing in this matter, the third-year review "resembles the tenure process sixth year process in many respects," involving review of teaching ability, of research and publications, and of college and community service. Considered during both reviews are student comments about candidates. "They are given a great deal of weight," testified Dean McKinsey. Should a candidate not survive a third-year review, that individual is extended a 1-year terminal contract and, then, her/his employment ends with Respondent. As will be seen, the third-year review process is one element of significance in connection with this proceeding.

The music department is the particular academic department involved in this proceeding. Basically, there are two areas of instruction in that department: classroom courses in music and, secondly, the applied music program. The latter concerns the practicum of music, encompassing lessons provided to individual students and various performing ensembles: orchestra, choir, chamber singers, and wind, jazz, medieval and renaissance, African drum, and African thumb piano ensembles.

The general administrative head of the music department is its chairperson or, perhaps during some academic years, chairpersons. According to Professor Steven Kelly, the chairperson performs "a wide range of responsibilities including . . . ensuring the integrity of the review and tenure process, preparing the department budgets, . . . managing in general the facilities that we have, supervising the adjunct faculty," and performing various "duties representing the department to the college, to the dean's office, various committees and off campus as well." During the 1994–1995 academic year, Lawrence Archbold was music department chairperson and Kelly served a cochair. Respondent admits the allegation that, during the 1995–1996 academic year and during the 1996–1997 academic year's fall term, Kelly had been music department chairman and, then, had become acting associate dean of the college during January 1997. It further admits that, while serving in those capacities, Kelly had been a statutory supervisor and its agent.

In the music department, classroom instruction is provided by full-time tenure and tenure-track faculty. Members of that faculty also participate in administration of the music department, performing such duties as career advising for students, being responsible for student workers, and administering the applied music program. Full-time faculty also participate in the applied music program. For example, Professor Kelly has taught the recorder and has directed the medieval and renaissance music ensembles. Tenure-Track Professor Ronald Rodman has served as director of the symphonic wind ensemble and has provided lessons for students of trombone, euphonium, and tuba. Most importantly to this proceeding, Hector Valdivia, who arrived at Respondent during 1994 and who was scheduled for a third-year formative review at the end of the 1996–1997 academic year, conducted Respondent's orchestra.

Most of the private lessons for students is provided by adjunct faculty. Indeed, providing lessons to students is the primary job of instructors who comprise the adjunct faculty. Each works under annual contracts, let for each academic year, which provide a wage rate and mileage. If they choose and are chosen, adjunct faculty members may also coach sections whenever, for example, the orchestra director needs someone to work with a section of the orchestra, such as the brass section, to perfect its part of a literature selection, or musical piece, which the orchestra will be performing. Adjunct faculty also may perform at recitals, either individually or with other faculty members and students. However, performing is not encompassed by the adjunct faculty's annual contracts. For that, they receive stipends as agreed upon on an individual basis.

For 13 years prior to the 1996–1997 academic year Karl Diekman had been an adjunct faculty member in Respondent's music department, instructing students in clarinet and saxophone and, also, coaching chamber music and doing orchestra and band sections. But following a meeting with Dean McKinsey and Chairman Kelly on September 5, 1996, he received a letter from Dean McKinsey dated September 9, 1996, giving notice that, "[i]n light of your negative attitude toward [Respondent] and your lack of commitment to the good of the department and our music program, I have decided not to offer you a contract for the coming year." It is this refusal to offer Diekman a contract for the 1996–1997 academic year which the General Counsel alleges had been unlawfully motivated.

By way of explanation for that refusal, the Dean's September 9 letter first lists five "specific actions you took last year that undermined our program," and which had been discussed during the September 5 meeting. Thus, in pertinent part, her letter states:

> (1) You made comments to two faculty members that you intended to work against Hector Valdivia's getting tenure here, to work to "get rid" of him. . . .
>
> (2) You complained to students about Professor Valdivia and about the department; I have documentation from last spring that two students experienced such complaints from you. . . .
>
> (3) A letter dated October 30, 1995, was sent to Professor Steve Kelly with four names attached: yours, Eric Kodner's, Lynn Deichert's, and Jim Hamilton's. You, Eric and Lynn accepted responsibility for the letter, but I received a signed statement from Jim Hamilton that he neither signed nor approved this letter. . . .
>
> (4) You issued a threat on March 13, 1996, to your department chair to withhold student grades because you were informed by the business office that computer problems might delay your usual mileage payments. . . .
>
> (5) You and two others wrote a complaint to the Faculty Affairs Committee, dated February 27, 1996, in which you knowingly included many overstatements and misstatements concerning the music department and its leadership that were inflammatory and unsupported by evidence. . . .

The letter continues by stating that, as these actions had been discussed during the September 5 meeting, Diekman's language and manner "were so negative and confrontational that it seemed to me you did not want to come to an agreement on

expectations," he had "repeatedly used profanity in talking about your full-time colleagues," "used sarcasm in describing departmental procedures," and "when asked if [Diekman] would agree to behave professionally in the future, [he] repeatedly evaded the subject and introduced new criticisms of the department"; he had "accused the department of not listening when they had listened but decided not to accept your idea," "issue[d] a blanket condemnation of the departmental program by saying that [Respondent]'s music program is the "laughing stock" of the entire musical community in the Twin Cities," and "said, 'You can put perfume on a pig, but you can't make it smell sweet'" in reference to the music department; and,

> When I asked you directly if you want[ed] a job here, your words were "I've replaced the income. I'll see when I get the contract." And when I pressed you, I believe for the fourth time, whether you would agree to behave professionally if you were to return to [Respondent], you waved your hand and said, "OK, sure," in an offhand, perfunctory way. And you indicated loyalty to adjunct faculty colleagues and to students, but you refused to espouse the good of the ensembles or of the larger music program.
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> In light of your negative attitude toward [Respondent] and your lack of commitment to the good of the department and our music program, I have decided not to offer you a contract for the coming year. Stephen Kelly, Chair of the Music Department, supports my decision. Chuck Carlin, President of the Faculty, who attended the meeting at your request, has affirmed to me in writing that "the procedures followed in the meeting were fair to all parties involved."

Facially, the five actions enumerated in the September 9 letterparticularly the ones numbered 1, 2, and 4might appear to provide legitimate cause for not renewing a faculty member's contract for another year. However, the General Counsel argues that they were advanced as mere pretexts, intended to conceal Respondent's actual motivation which was Diekman's activity on behalf of the adjunct faculty committee(TAFC), an admitted labor organization within the meaning of Section 2(5) of the Act.

Indeed, as described in subsections C and E below, items 3 and 5 pertain to activities conducted by Diekman in conjunction with TAFC. Based upon that fact, the General Counsel's argument advances, in essence, along two avenues. First, that those two items were the actual reasons for Respondent's hostility toward Diekman, with items 1, 2, and 4 not being true matters of concern to it, but being included merely to disguise those actual reasons for its hostility toward Diekman. Second, even if Respondent had been genuinely concerned about Diekman's conduct embraced by items 1, 2, and 4, those concerns would not have led to its meeting with Diekman on September 5, but rather concern about those three items had been outweighed by Respondent's hostility toward Diekman because of his activities on behalf of TAFC.

Under either alternative, that argument proceeds, the subjects of the September 5 meeting included activity protected by the Act. Diekman was criticized during that meeting for that protected activity and was confronted with a demand that he abandon some of the means by which he had been engaging in it. When he defended himself, his manner of defense and his refusal to cease engaging in statutorily protected activity was seized upon as the eventual reason advanced for not extending another contract to him. Thus, concludes the General Counsel's argument, Respondent's actual motivation had been rooted, altogether or substantially, in Diekman's union and other activity protected by Section 7 of the Act.

Not so, contends Respondent. Rather, Diekman's activities encompassed by items 3 and 5 either were activity to which the protection of Section 7 does not extend or, alternatively, constitute activity which was exercised in a manner which exceeded the protection of the Act. As to the latter, of course, "there is a point when even activity protected by Section 7 of the Act is conducted in such a manner that it becomes deprived of protection that it otherwise would enjoy." (Citation omitted.) *Indian Hills Care Center*, 321 NLRB 144, 151 (1996).

Beyond that, Respondent contends that the five above-quoted concerns in the September 9 letter had been listed in descending order of importance, with items 3 and 5 being subordinate to the primary concerns enumerated as items 1 and 2, as well as item 4. In short, while there was concern about Diekman's TAFC-related activities, such concern was outweighed by other concerns arising from activitiescovered by items 1, 2, and 4not protected by Section 7 of the Act. As a result, the September 5 meeting would have been conducted in any event, even if there had been no occurrence of the activities embraced by items 3 and 5.

Finally, Respondent argues that, during the September 5 meeting, Diekman refused to make a commitment to refrain from engaging in activity not protected by the Act, in the process resorting to words and conduct, detailed in the dean's above-quoted paragraph from her letter, which exceeded the Act's protection. Such words and conduct were "unnecessary to carry on [his] legitimate concerted activities," (footnote omitted), *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962), and "need not be tolerated," *Caterpillar Tractor Co.*, 276 NLRB 1323, 1326 (1985), inasmuch as they were so "egregious or flagrant" as to "justify discharge" even if that "conduct occurred in the course of otherwise protected activity." (Citation omitted.) *Coors Container Co. v. NLRB*, 628 F.2d 1283, 1288 (10th Cir. 1980).

For the reasons set forth in section II, infra, I conclude that a preponderance of the credible evidence establishes that Respondent's failure to extend a 1996–1997 instructor's contract to Diekman did violate Section 8(a)(3) and (1) of the Act. I reach that ultimate conclusion based upon several penultimate conclusions. Given the number of areas encompassed by subjects which must be understood to evaluate Respondent's motivation, in fairness to the reviewer some guidance as to those penultimate conclusions should be set forth before describing the facts underlying them, so that review of the latter is facilitated.

The most delicate of those conclusions concerns the credibility of the witnesses. Everyone who testified is an educator. I have no desire to injure the reputation of any one of them and, accordingly, will not dwell at length on conclusionary review of my impression of their candor. Suffice to say that the recitation of facts in succeeding subsections illustrates the sometimes internally contradictory and other times uncorroborated testimony, as well as frequent inconsistencies with objective considerations and other testimony, with which accounts should seemingly have been consistent, of the principal witnesses' accounts in this matter. Those objective considerations, derived from review of the record of their testimony, confirm my impressions, formed as each appeared as a witness, that the

principal witnesses in this proceeding were not testifying with full candor. Rather, each seemed to be tailoring his/her testimony to fortify the position of the side which he/she favored. Consequently, I do not fully credit any of them, save to the extent that their accounts are supported by objective considerations or by credible testimony.

Second, Diekman did engage in activity protected by Section 7 of the Act. True, at some points he and TAFC appeared to be trying to negotiate with Respondent about subjects not normally encompassed by the bargaining processabout matters which go beyond "settle[ing] an aspect of the relationship between [Respondent] and the" adjunct music faculty, *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971), and, instead, are the types of "management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, [which] have only an indirect and attenuated impact on the employment relationship." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 676–677 (1981). As a result, there is some basis for arguing that, considered in isolation, efforts to deal with Respondent about the latter class of subjects exceeds the scope of Section 7's "mutual aid or protection" provision. See, e.g., *Nephi Rubber Products Corp.*, 303 NLRB 151 (1991) (Disposition of charging Parties Steele, Hall, Buckley, and Calderwood); *Damon House, Inc.*, 270 NLRB 143, 143 (1984) ("were not directly related to job interests").

Nonetheless, "parties are free to bargain about any legal subject," the Supreme Court pointed out in *First National Maintenance,* supra, Furthermore, the Board has held explicitly that, "It is well settled that employees who attempt to persuade their employer to modify or reverse a management decision are engaged in conduct which is protected by Section 7 of the Act." (Citations omitted.) *Alumina Ceramics, Inc.*, 257 NLRB 784, 784 (1981).

Third, while the evidence fails to show that Respondent is hostile to the collective-bargaining process or toward unionization of its faculty, in general, it also shows that its officials, and perhaps also its tenure and tenure-track faculty, were not favorably disposed toward a separate organizationTAFCrepresenting only adjunct music faculty, nor toward adjunct faculty who were its proponents.

Fourth, that attitude was displayed particularly with respect to TAFC's memorandum to the FAC, dated February 27, 1996. On its face, however, that multipage memorandum reveals no statements which fall outside of the Act's protection. Further, aside from generalized assertions that it contains "overstatement and misstatements" which were "inflammatory and unsupported," with a single exception, no specific such statement were identified, either to Diekman on September 5, 1996, nor during the hearing in this proceeding.

Fifth, item 3 in the September 9 letter represents an invasion of the internal affairs of a conceded labor organization, TAFC. Moreover, by becoming involved with the substance of TAFC's February 27 communication to the FAC, the dean effectively injected herself into the FAC's disputes resolution functionbecame involved in a component of the overall bargaining process under the Act. Having done so, discussions with TAFC-Official Diekman were governed by statutory principles and did not fall wholly within the ambit of employee-employer disciplinary discussions.

Sixth, although it appears that accusatory, confrontational and strident language was used by Diekman during the September 5 meeting, there is no credible evidence that he had resorted to language that can be characterized as profane or obscene, though it does appear that he used a couple of what might be characterized as off-color terms and one perhaps offensive metaphor in the course of disputing assertions made to him. In the circumstances of that meeting, during which statutorily protected activity and disputes being considered by the FAC had been integral parts of what had been discussed, latitude must be allowed to implement the "congressional intent to encourage free debate on issues dividing labor and management." (Footnote omitted.) *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62 (1966).

"Labor disputes are ordinarily heated affairs," with labor and management "often speak[ing] bluntly and recklessly, embellishing their respective positions with imprecatory language." (Citation omitted.) Id. at 58. And, "freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB." *Letter Carriers v. Austin*, 418 U.S. 264, 272 (1974). Statutory protection is not lost by "overenthusiastic use of rhetoric or the innocent mistake of fact, nor by "lusty and imaginative expression" or "exaggerated rhetoric." Id. at 286. As will be discussed further in section II, infra, there is no credible basis for concluding that anything in TAFC's communications, nor in Diekman's September 5 words and conduct, had been "so extreme as to lose the protection of the Act," *Brunswick Food & Drug*, 284 NLRB 663, 664 (1987), enfd. mem. 859 F.2d 927 (11th Cir. 1988), nor to conclude that his words and conduct "would encourage insolence, insubordination, and intimidation." *NLRB v. Red Top, Inc.*, 455 F.2d 721, 728 (8th Cir. 1972).

Seventh, Respondent's testimony that items 3 and 5 were of less importance, than the other three items in the September 9 letter, is not supported by the evidence. Rather, a preponderance of the credible evidence establishes that the conduct encompassed by items 3 and 5 were regarded by Respondent's officials to be of primary importance. Indeed, by September 5 only the first item appears to have concerned an area that was either not somewhat stale or lacking in support by evidence of actual impropriety.

Eighth, the commitment sought of Diekman during the September 5 meeting was so generalized and ambiguous, in the context of his being effectively reprimanded for both statutorily protected activity and activity outside of the Act's protection, that it could not be concluded that an employee would not construe the commitment sought as embracing abandonment of union and protected concerted activity. Moreover, I am convinced that the generality of the language used was a deliberate attempt to secure from Diekman a promise not to engage in statutorily protected activity, while avoiding specifically saying so. Accordingly, his refusal to make such a commitment in the circumstances, and his words in refusing to do so, did not constitute unprotected activity.

B. Activity Leading to Formation of TAFC

So far as the record shows, prior to the spring of 1995 adjunct music faculty were not represented. Whenever problems arose, they dealt with the administration through a part-time faculty liaison committee. As Kelly explained, "periodically people would be concerned. Then the committee would be set up and then we would proceed on addressing various issues."

Eric Kodner, an adjunct instructor teaching French horn for Respondent, testified that there had been "some informal dis-

cussions" among adjunct faculty members about that situation during the spring. As to the specific subjects of those discussions, both he and Diekman identified pay levels at Respondent in comparison to those at comparable institutions; facilities available to adjunct faculty members, such as phones, clocks and chalkboards in rooms where they gave lessons; and missing and damaged music or parts of music in the instrumental music library. Kodner also testified that some adjunct faculty members had expressed the opinion that "they should be consulted in [sic] with regard to things that came to bear on their students or came to bear on their teaching of applied music." Similarly, Diekman testified, "We wanted some artistic input. We wanted some input into curriculum. We just generally wanted to be, you know, listened to and have our—some of our suggestions taken."

After consulting with an attorney and with the Minnesota Federation of Teachers, Diekman, and Kodner, along with adjunct faculty members Lynn Deichert and Andrea Kodner-Wenzel, formed an ad hoc music faculty committee and prepared a questionnaire or survey which the committee distributed to adjunct music faculty. One subject covered by that survey was whether the part-time faculty liaison committee system "should be reorganized to more adequately meet the need for adjunct faculty representation and involvement in departmental matters[.]" Also asked was whether full-time faculty should be included in such a reorganized committee and, in addition, whether members of such a committee should "be elected entirely by adjunct or part-time faculty, rather than appointed by the department chairperson?"

On the questionnaire, nine adjunct music faculty members were listed below the question, "If nominations were sought for a more permanent committee to serve as an ongoing liaison between adjunct faculty and the music department, whom would you nominate?" Among the names included were those of Diekman, Kodner, Deichert, and James Hamilton.

The ad hoc committee made no effort to conceal its survey from Respondent. Notice was given to then-chairman Archbold, by letter dated April 21, 1995signed by ad hoc committee members Deichert, Diekman, Kodner, and Kodner-Wenzelthat, "[a]n ad hoc committee of adjunct music faculty members has recently been formed," that a 28-question survey had been created and disseminated "to determine needs and concerns of the part-time, adjunct music faculty," that a summary of the survey's results would be prepared and "forwarded to you for your review and comments," and that the ad hoc committee hoped Archbold would "be willing to meet" with it "to discuss and set goals for meeting adjunct faculty needs," inasmuch as the ad hoc committee viewed the survey as "a much-needed and useful tool for providing adjunct faculty with input into matters which directly affect them."

Archbold did not appear as a witness. There is no evidence that he reacted with hostility upon receiving the April 21 communication from the ad hoc committee. To the contrary, by memorandum dated May 3, 1995, he thanked the four ad hoc committee members for their letter and stated, "Members of the full-time faculty, including myself, would of course be interested and willing to meet with you to discuss your concerns regarding the part-time music faculty. I look forward to receiving the results of your survey."

By letter dated May 22, 1995, a summary of those results were communicated by Deichert, Diekman, Kodner, and Kodner-Wenzel, as "Members of the ad hoc Adjunct Music Faculty Committee." That summary covers results of questions concerning such matters as adjunct faculty satisfaction with compensation and various suggested improvements to it, compensation for travel time, appreciation and responsiveness to their comments and suggestions, full utilization by the department of adjuncts' capabilities, opportunity to negotiate the terms of annual contracts, and being invited to music department faculty meetings.

The summary also reports results of questions concerning certain other subjects: the number of lessons which should be required each term for music majors, requiring students to take lessons to participate in ensembles, preparedness of new applied music students, vocal and instrument student recruitment, disallowance of credit to students for taking applied music lessons elsewhere than at Respondent, auditioning students for the concerto competition, and statements by outsiders that a nearby college, St. Olaf, "has a superior music department."

Near the end of that letter, the ad hoc committee members state, "We will be glad to meet with you, at your convenience, once you have had the time to examine the enclosed information." A meeting was arranged for June 1, 1996. Deichert, Diekman, and Kodner attended on behalf of the ad hoc committee. Also attending were Archbold, Kelly, and seven tenure and tenure-track faculty, including Professors Rodman and Valdivia. Having by then communicated to Respondent the specific questions asked by the questionnaire, and a summary of answers to them, however, the ad hoc committee was not met with the wholehearted receptiveness which might have been anticipated based upon Archbold's above-quoted remarks in his May 3 memorandum.

Archbold began the meeting by speaking about, as Diekman phrased it, "[T]the way things have been done." More specific and complete was the uncontradicted testimony given by Kodner about those remarks. He testified that Archbold began the meeting with "what amounted to a 30 minute lecture about the way that—the roles between adjunct and tenured and the way that this has been and the way it is now and the way it always will be." "We felt as if we were being lectured," testified Kodner. Nonetheless, Archbold's lecture was followed by a relatively prolonged discussion of the survey's results. Two aspects of that discussion are significant to this proceeding.

First is a dispute about what Kelly had said when the subject was raised of adjunct music faculty unionizing. Diekman testified that, in response to a description of east and west coast adjunct faculty and graduate students trying to organize, Kelly had "said that if that were to happen at [Respondent] that the department would have to discontinue offering applied music because they would not be able to afford to pay us." As to what Kelly had said, Kodner testified, "My recollection is that Professor Kelly said that if we were to organize—if we were to unionize, that the department would have to stop offering applied music—music lessons. Instrumental music."

Kelly denied flatly having said, during the June 1 meeting, that it would be the end of the applied music program if a union came in and, further, denied having said anything to that effect. So, also, did Rodman and Valdivia. Thus, asked if Kelly had made any type of threat about shutting down the applied music program if a union came on campus, Rodman testified, "No, that certainly was not a statement that was made." Similarly, Valdivia denied that Kelly had made any type of statement indicating that if a union came in, Kelly would shut down the applied music program, asserting further, "And that was not

indicated that it was going to end." Both of these tenure-track faculty gave added testimony which somewhat illuminates these denials and, as well, the above-quoted descriptions by Diekman and Kodner.

When he denied that Kelly had made any type of statement about shutting down the applied music program if a union came in, Valdivia added, "I could say that is a statement taken wildly out of context." Asked to what he was referring, Valdivia responded, "Professor Kelly was attempting to inform members of the committee that their request for additional funding was not possible and I'm not quite sure how they wrapped all of that in the way they did but," at which point he was interrupted by another question. However, after testifying that there had been a discussion during the meeting of possible impact on the department of increasing cost, Rodman testified:

> The gist of the conversation was such that private lessons at [Respondent] are subsidized from student fees. The concern by the department was that if we raised fees some students may not be able to afford private lessons. So we could raise fees but we would have a lower participation in the applied music program so that was the concern. It's kind of a supply and demand sort of a critical balance. Certainly we want to compensate our adjunct faculty to the best of our ability but we don't want to price ourselves out of the market either.

In short, regardless of whether or not Kelly threatened closure, he had expressed concern about the economic affects on the applied music program if adjunct faculty were to unionize.

The second significant aspect of the June 1 meeting was the uncontested testimony that, as the meeting wound down, a member or members of the ad hoc committee mentioned the nomination portion of the questionnaire, saying that there would be an election during the fall term to formally elect a successor committee to represent adjunct music faculty. Undisputed by Kelly was Diekman's testimony that, "steve said it was a good idea that we would have elections to have a committee[.]" That undisputed response to the remark which generated it should not pass unnoticed.

For, testified Kelly, during the ensuing summer months he and Archbold put together a report on the Applied Music Lesson Program. It was distributed to all music faculty at the beginning of the 1995–1996 academic year.

The report begins by stating, "this report seeks to address a variety of issues concerning the applied music lesson program at" Respondent. It continues by enumerating various improvements in that program: promotion of five adjunct music faculty "based on seniority, teaching load, and the results of a review of their work," with those same factors held out as the basis for potential promotion of additional adjunct faculty members; reallocation of music department funds "to provide modest raises for adjunct faculty who have been promoted" and, by redirecting funds from "one or two concerts by outside artists which would have taken place at" Respondent to payment "for performances by adjunct faculty in concerts organized by the department"; completion of "a new pay-scale for performances in [Respondent] concerts" to promote "fairness and equity among the adjunct faculty" who participate "in department rehearsals and performances"; payment of overtime for chamber music coaching; possible pay increases for lessons during the 1996–1997 academic year; and, modification in mileage policy so that "teaching loads will need to justify . . . miltiple [sic] trips per week to campus in order that the mileage allowance be increased."

Of course, those responses are significant insofar as they tend to demonstrate a willingness to institute improvements after being met with the prospect of separate organization by adjunct music faculty. However, an equally significant aspect of the report appears on its fifth page, under the general title **"**Looking to the Future." There is stated: "the department plans to form a new adjunct faculty concerns committee for the purposes of continuing discussion of issues related to the applied music less program." The report goes on to state that there will be "several full-time faculty members" on that committee(AFCC) and "one representative each of the following areas of the applied music teaching:" piano and other keyboard, voice, strings, and "other instruments (woodwinds, brass, etc.)".

Although the report acknowledges that there had been "a meeting of an ad hoc committee of adjunct faculty with full-time faculty members," Kelly denied when testifying that, at the time of distributing the report, he had any knowledge "of any intent on the part of people to hold an election for a committee separate from this kind of reinvigorated" department-sponsored one: "No, I did not," testified Kelly. Obviously, that denial conflicts with the above-described statement and his response to it at the conclusion of the June 1 meeting.

There was some dissatisfaction among adjunct faculty at being told that they would be represented with full-time faculty in AFCC and, also, about the restricted groups from which adjunct representatives could be chosen to represent them all. Nonetheless, Diekman and Kodner testified that the adjunct faculty accepted representation by AFCC as, in effect, another course for pursuing their concerns with the music department which, by September, was being chaired by Kelly. The adjunct faculty's acceptance of AFCC was further facilitated when Archbold, by then serving as applied music program administrator,[2] agreed, during a faculty meeting on September 21, 1995, with Kodner's suggestion that AFCC representatives be elected, rather than, as originally contemplated, being appointed.

At no point during that September 21 meeting, nor on any other occasion, were the adjunct music faculty told that they could not have their own committee. And, despite creation of AFCC, it soon became apparent to Respondent that the ad hoc committee intended to continue pursuing creation of a separate committee to represent adjunct music faculty.

In a letter to adjunct music faculty dated September 28, 1995, the ad hoc committeenow reduced to Deichert, Diekman, and Kodnerreviewed the survey and June 1 meeting. Enclosed was a ballot from which five adjunct music faculty members were to be designated to serve on what would become TAFC. Listed on that ballot were 7 of the 10 nominees selected by adjunct faculty who had chosen to respond to the spring questionnaire, the other 3 being on sabbatical leave or no longer teaching at Respondent, according to the letter. The ballot also left space for two write-in nominees. Adjunct music faculty were informed by the letter that, "the top five vote-getters will serve on [TAFC] for the remainder of the 1995–1996 academic year." A deadline of October 11, 1995, was stated for postmarks on completed ballots which were mailed.

By memorandum dated October 2, 1995, Archbold and Kelly sent to all adjunct music faculty an "OFFICIAL BALLOT" for

[2] See, e.g., G.C. Exh. 8.

election of adjunct faculty, from each of the report's above-enumerated four areas, to serve on AFCC. The letter above the ballot explains that, "[w]e divided the adjunct representation into these areas . . . to reflect the numbers of lessons taught and to try to ensure multiple viewpoints." Still, that division resulted in Deichert, Diekman, and Kodner, the three ad hoc committee members, being lumped together in the "Winds/Brass/Percussion/Ethnic Inst." Area, with the result that only one of them could have been selected for AFCC.

TAFC's election resulted in adjunct music faculty members Deichert, Diekman, Kodner, Elizabeth Ericksen, and James Hamilton receiving the most votes. Diekman handwrote an announcement to that effect, including the observation that more adjunct faculty voted than had returned completed questionnaires. According to Kodner, that announcement was sent out as notification TAFC's election results.

By memorandum dated October 26, 1995, Kelly notified adjunct music faculty that elected to AFCC had been adjunct music faculty members Marcia Widman, as keyboard representative, John Ellinger, as strings representative, and Mary Martz, as voice representative. According to that memorandum, "the person elected from that 'Winds/Brass/Per cussion/Ethnic' area felt he was too busy at this time to serve," and volunteers were solicited to replace him.

One paragraph of Kelly's memorandum would touch off a contretemps with TAFC. That paragraph reads:

> Some of you expressed confusion over the [AFCC] election because a small group of adjunct faculty, unbeknownst to the Department, ran a simultaneous election for their own separate committee even though the individuals involved knew that an election was being held for the Departmental AFCC. Anyone is permitted, of course, to have any committee, or number of committees, they would like. Furthermore, adjunct faculty members of this non-Departmental committee may ask to meet with the Departmental AFCC. There is, however, only one Department committee for adjunct faculty concerns, and it is the one described above.

Obviously, this paragraph contains a clear statement that Respondent did not intend to recognize any labor organization designated as the representative of adjunct music faculty.

Equally significant are its remarks inconsistent with the undisputed notice to Kelly on June 1 that the ad hoc committee would be conducting a fall election and, as well, with his uncontested endorsement of that course of action. Nonetheless, Kelly claimed that he had been "surprised" when he had heard from two adjunct faculty members about TAFC's election. He did not identify those two individuals. Nor did either one of them appear as witnesses to corroborate his assertion of how he had heard about TAFC's election. And, Kelly did not testify with particularity as to what those two adjunct faculty members supposedly had told him.

C. The Hamilton Correspondence

The above-quoted paragraph from Kelly's October 26 memorandum did not go unanswered by TAFC. That answer forms one basis for events which would occur almost a year later.

By letter dated October 30, 1995, "Members of TAFC" Deichert, Diekman, Kodner, and Hamilton[3] protested to Kelly above "several statements in this memorandum which appear to be misleading and inaccurate." TAFC's letter asserts that, "[t]he 'small group' you are referring to consisted of eighteen ballots cast out of 28 distributed (or a 64.3% response) for nominees to" TAFC and states, "those who took the time and effort to cast ballots for our committee will surely take offense at such a dismissive characterization."

The October 30 letter continues with a review of the June 1 meeting, asserting that during that meeting "we discussed with those present the results of our 'Part-time Adjunct Faculty Survey,' including the fact that nominations were sought for this year's Adjunct Faculty Committee as part of that survey." Seemingly at odds with Diekman's testimony about the June 1 meeting quoted in subsection B, the October 30 letter states, "the former department chairman was fully aware of our intent to hold an election this autumn for a successor committee to last year's 'ad hoc' committee; in fact, he commented at the June 1st faculty meeting that it was a 'good idea.'" Of course, Diekman testified that it had been Kelly who had made that "good idea" statement on June 1.

Yet, Kelly did not dispute Diekman's description as to what he had said on June 1. Moreover, no examination, direct or cross, was conducted concerning the seeming inconsistency between Diekman's testimony and the October 30 letter's description of the "good idea" remark. Given the absence of opportunity for explanation for that discrepancy, Fed.R.Evid. Rule 613(b) and Advisory Committee's Note thereto, 56 F.R.D. 183, 278, as well as the facts that Diekman's testimony was given under oath, while the same cannot be said of the letter's statements, and that Kelly never denied attribution of the "good idea" statement to him, I conclude that the letter's account of who had made that remark is not entitled to any weight, either as substantive evidence nor, even, as an impeaching inconsistent statement.

It should not escape notice that, with the October 30 letter, some rather strongly worded accusations began to be leveled against Respondent and Kelly. Thus, the letter asserts that "it appears that the department chose to largely ignore the" survey's results and, further, that "the department chose to interfere with adjunct faculty members ability to elect their own representatives[.]" It accuses the department of "an apparent disregard for 'adjunct faculty concerns,'" and of apparently taking a position which "would be indeed anti-democratic and not in keeping with College policy or academic freedom." But, the October 30 letter concludes on a relatively conciliatory, albeit somewhat acrid, note:

> If it is true that "imitation is the sincerest form of flattery," then we are indeed most sincerely flattered by the department's subsequent formation of its "AFCC". Our goal last academic year was to draw attention to the needs and concerns of adjunct music faculty. At the time the our [sic] ad hoc adjunct committee was formed last spring, there seemed to be little apparent interest on the part of the department in surveying the depth of such needs and concerns. We are gratified that our efforts have had such a profound impact

[3] The fifth adjunct music faculty members elected to TAFC, Elizabeth Ericksen, apparently decided not to serve and, so far as the evidence discloses, no effort was made to elect a replacement member.

upon department policy in dealing with adjunct music faculty matters.

So far as the evidence reveals, Kelly did not respond to TAFC's October 30 letter. But, on the day after it was dated, a department of music memorandum was sent, according to its October 31, 1995 date, by Hamilton to TAFC members Diekman, Deichert, and Kodner. Hamilton's memorandum states that he is resigning immediately from TAFC and requests that "you not include my name on any publications sent by the TAFC[.]" In that memorandum, Hamilton also states, "I did not vote for myself on the ballot I received. In addition, it was not clear to me that the ballot sent from Stillwater (presumably from Karl Diekman) was for a separate committee from the one being formed by the Department."

By letter to Hamilton dated November 6, 1995, Kodner, acting for TAFC, expressed puzzlement as to why Hamilton had chosen "to deliver your message in the form of a 'Department of Music Memorandum,'" and states that "Diekman contacted you by phone on September 19th and read you the list of names to be included on the TAFC ballot at that time, including your own." "If you did not wish to appear on our ballot, why did you not simply withdraw your name before the election?" Kodner's letter asks. After challenging Hamilton's asserted unclearness about the ballot which he had received from Diekman, Kodner asserts in his letter, "Your grave concern that the department might link your name with our committee is all too apparent in you letter of resignation."

There are three somewhat interesting points about that exchange of correspondence. Hamilton's October 31 letter to TAFC shows, at the bottom left, that copies were sent by him both to Respondent's student newspaper editor and to Kelly. Hamilton did not appear as a witness, though there was neither representation nor evidence that he was not available to testify. So, his decision to send a copy of his memorandum to Kelly, like his decision to use a department of music memorandum, is not explained. Nor are any reasons for those choices discernible from the evidence which has been presented.

Second, Kelly testified that, "[e]arly in the fall it came to my attention from Jim Hamilton that a letter that was sent out had his name attached. Then [he] wrote me a note saying that he had not seen the letter nor did he agree with its contents." As to the latter, Kelly identified a music department memorandum from Hamilton's UBJECT: Letter of October 30, 1995 "to 'Whom it may concern,' which states" "the letter of October 30, 1995 carrying my name along with those of Lynn Deichert, Karl Diekman, and Eric Kodner was issued without my knowledge or approval. I had not seen the letter or signed it. Nor do I approve its [sic] contents."

Initially it appeared from Kelly's testimony about receiving that memorandum that he had received it from Hamilton somewhere around the time of TAFC's October 30 letter to Kelly. When Hamilton's memorandum to Kelly was produced and identified by the latter, however, that obviously was not the fact. For, Hamilton's memorandum to Kelly bears the handwritten date "5/21/96". In short, the memorandum had been prepared and dated almost seven months after the TAFC memorandum about which Hamilton disavows responsibility.

Kelly never explained what had led Hamilton to decide abruptly in late May 1996 to prepare such a memorandum. As he did not appear as a witness, of course, there is no explanation provided by Hamilton for so belated preparation of that memorandum. Nor is an explanation inferable from the evidence which was presented. Significantly, as will be seen in subsection H., infra, the "5/21/96" date of Hamilton's memorandum to Kelly shows that it had been prepared and transmitted to Kelly at a time when the latter was receiving some other documents that reflected adversely on Diekman.

At this stage, the third point about Hamilton's supposed failure to authorize use of his name in connection with TAFC's October 30 memorandum arises from Kelly's testimony that he had learned about it "[e]arly in the fall." In her September 9, 1996 letter to Diekman, McKinsey states, in connection with item 3 of that letter, "signing another's name to an unseen document is, at best, highly questionable behavior." If so, then presumably Kelly would have taken some action upon learning, almost a year earlier, about the purportedly unauthorized use of Hamilton's name by TAFC. But, there is no evidence that Kelly did anything whatsoever after learning from Hamilton about the purported lack of authorization to TAFC for use of his name. That is, there is no evidence that Kelly took any action to have Deichert, Diekman, or Kodner disciplined, at least not during the remainder of 1995 or early 1996. There is no evidence that Kelly suggested that McKinsey initiate any action against any one of those three TAFC representatives. Indeed, there is no evidence that Kelly even made any effort to investigate Hamilton's supposed fall report.

D. TAFC Achieves Recognition

Even though TAFC had been formed and was operating, it was not actually recognized by Respondent, as the exclusive representative of adjunct music faculty, during the remainder of 1995. Of course, there is nothing unlawful about Respondent's not having done so. See, e.g., *Summer & Co. v. NLRB*, 419 U.S. 301 (1974). Nor should any inference adverse to Respondent be drawn from its failure to do so. Nonetheless it is significant that during a period when Respondent was not recognizing TAFC, it did recognize and deal with AFCC, an organization which it had created to represent, inter alia, adjunct music faculty. For example, as Kelly began preparing a budget for the 1996–1997 academic year, he invited input from AFCC. AFCC-Strings Representative Ellinger, in turn, solicited input into that process from Diekman and Kodner.

By memorandum to Ellinger dated November 22, 1995, they submitted a "wish list" of suggested improvements: a "coffee machine located in some sort of makeshift faculty lounge area," a "locking metal cabinet to put coffee cups, coffee, filters and similar supplies in," access to the music and drama building computer room "or to any similar such computer and printer," a blackboard and lockable cabinet in the room Kodner "shares with Ms. Klemp," some way of obtaining "individual phone numbers and voice mail," a review of chamber music and large ensemble collections for missing parts, a greater number of CDs for the department's collection, and greater efforts to ensure that student instrumental music library, I-Libe, workers adhere to posted schedules.

On receiving the "wish list," Ellinger transmitted it to Kelly. The latter testified that, upon receiving it, he planned "to try to do whatever I could to take action on these items and any other things that were of concern to , . . the adjunct faculty," even though the point of the process at that time was to prepare a budget for the following academic year. By memorandum to Diekman and Kodner dated November 29, 1995, Kelly stated that inasmuch as their requests had been "modest … ., by shifting some funds around, I think we can satisfy most of your

requests immediately," despite an "extremely tight" budget providing for no or minimal increases in a number of areas.

In that memorandum, Kelly stated that he had ordered a "small lockable storage cabinet for LL04 to house a coffee maker and supplies," as well as "two armchairs for the room," and promised to "buy a Proctor/Silex model" coffee maker. He also promised to "obtain a printer for the computer in the" I-Libe and to make available more blackboards through room reallocation during the following year or by purchasing them. Inasmuch as the existing "phone system can accommodate up to nine different mailboxes on each extension," Kelly promised to "poll the adjunct faculty . . . to find out who would like to make use of this capability and try to get it set up next term." Kelly also promised to order any "missing parts for chamber music works" reported to Valdivia or Rodman and, also, to order, "within reason," any CDs "that individuals would like to have in the collection." Finally, Kelly stated that, "[a]ccording to Hector and Ron, the student workers in the I-Libe have been much more reliable this year. You can help us by informing Carole [Stevens, the music department secretary] if a student worker is not in the I-Libe or setting up for rehearsal during posted hours."

Kelly's promises were not without qualification. In his memorandum, he points out that there is no faculty lounge anywhere on campus; that purchase of coffee, filters, and other items for the coffee machine "will be the responsibility of the individuals using the coffee maker," that the individuals using the coffee machine, not students, will be responsible for making coffee and for cleaning the coffee machine; that the department's computer lab "is for student use for various music software and composition programs" and, because of demand for its use, "we would like to keep the facility dedicated to that purpose," but a computer in another room is available and, in addition, Ellinger or Justin London could be contacted if adjunct faculty have a need for "specialized notation and composition programs"; and, that "we simply do not have the student work hours to do an ongoing complete survey of all the music. We need to rely on our students and faculty to tell us what is missing."

Viewed in its entirety, Kelly's memorandum appears as some form of olive branch extended to the adjunct music faculty, albeit through AFCC, not TAFC. But it was not so received. In a petulantly-worded memorandum to Ellinger dated December 6, 1995, TAFC replied, "We agree with Steve that our requests were modest and feel gratified that at least something was accomplished. The coffee maker will be a welcome improvement," but the memorandum continues with a series of negative remarks about statements made in Kelly's November 29 memorandum. For example, with regard to the request that absences of student workers be reported, TAFC's memorandum states, "If necessary, we can provide names of students and faculty who have reported this problem, but we feel that it is not part of adjunct faculty job descriptions to "police" student worker attendance at the I-libe." A similar response was made to Kelly's request that missing parts be reported: "As with Steve's request that we police student worker attendance in the I-library, the expectation that we put in more unpaid "prep time" on behalf of the department by searching for missing parts in the library is unacceptable."

With regard to Kelly's invitation to submit requests for CDs, TAFC's December 6 memorandum responds, "Adjunct faculty members whom we have surveyed do not recall ever having been asked what CD's [sic] should be included in the MLR collection. If the department would actively solicit suggestions, rather than addressing the issue only when a complaint is received, perhaps the situation would improve. It would be helpful if Steve could provide us with a list of CD's [sic] he has purchased." TAFC's memorandum concludes:

> As a footnote to this discussion, we would like to point out that we were somewhat surprised by the mildly confrontational and patronizing tone of Steve's memo. No one ever requested a dedicated "faculty lounge" *per se* (I believe the term we used in our memo of 11/22 was "some sort of makeshift faculty lounge"). We also do not recall having requested the department to purchase coffee, filters, sugar, cups, or anything else of that sort, nor did we request that student workers in the I-libe make coffee for us, or clean the coffee maker [interestingly enough, the student worker who has assisted Carole Stevens during the past year, Ms. Cory McCann, told us that part [of] her duties at Music Hall include making coffee for faculty in that building]. Finally, Steve's lecture about the use of the Computer Lab, and the usual song and dance about "tight budgets" was unnecessary. We feel these energies could be better spent working together to improve facilities and conditions, rather than pontificating about department policy.

There is no evidence that Ellinger ever showed this memorandum to Kelly.

Notwithstanding the tenor and substance of the December 6 memorandum, TAFC did follow through on some of Kelly's suggestions. In a memorandum to all adjunct music faculty dated January 1, 1996, it reported the improvements which Kelly had agreed to provide and, also, ongoing efforts to install windows in studio doors, so that the possibility of sexual harassment complaints would be minimized, and to have re-evaluated the process for negotiating adjunct faculty's annual contracts. In addition, the memorandum invited adjunct faculty to report instances when scheduled student workers were not present in the instrumental music library and, also, missing music parts. It invited adjunct music faculty to submit requests for CDs. By the end of 1995, relations between TAFC and Respondent's music department appear to have begun settling down.

On January 2, 1996, there occurred a telephone conversation between Valdivia and Diekman. It evolved into an acrimonious discussion. That conversation is discussed in greater detail in subsection H., infra. At this point, there are three significant aspects about what occurred afterward.

First, during that conversation, there was mention of wage scales established for the Northfield area by Twin Cities Musicians Union Local #30-73, American Federation of Musicians (Musicians Union). By letter to Valdivia dated January 2, 1996, Russell J. Moore, secretary-treasurer of Musicians Union, gave notice that Respondent, "effective January 1, 1994, is in the jurisdiction of" Musicians Union. Copies of Moore's letter were sent to Kelly, to Archbold, to Respondent's director of personnel services, Bonnie-Jean Mork, and, for an unexplained reason, to Professor Rodman. Attached to the letter was a copy of contract scales for live performances.

Now, there is neither contention nor evidence that Musicians Union, at any material time, has been the recognized exclusive representative of Respondent's adjunct music faculty, within

the meaning of Section 9 of the Act, or of any other of Respondent's faculty. In fact, during January and February, and possibly extending into March 1996 Diekman and Kodner circulated cards, given them by Moore, among at least Respondent's music faculty. Their organizing effort turned out to be unsuccessful because, both testified, Moore had given them the wrong cards. By March the organizing effort was abandoned.

Second, during January 1996 Diekman pursued his dissatisfaction with Valdivia's words and the tenor of his responses during their telephone conversation. He voiced that dissatisfaction in a memorandum to Director of Personnel Services Mork. That memorandum was not the only written complaint about Valdivia which was communicated during that month.

By memorandum to Ellinger dated January 15, 1996, TAFC complained about Valdivia's asserted "disturbing changes in policy regarding student chamber groups," concerning which "[s]everal adjunct faculty members have expressed concern. . . ." Then, in a memorandum to Kelly dated January 22, 1996, Kodner stated, "I am writing with some concerns which several of my students have voiced about the Carleton orchestra." The very propinquity of those three complaints is significant. But, so also is the content of Kodner's letter, given the eventual criticism to which Diekman would be subjected during the following summer about interactions with student. Thus, the content of Kodner's letter is worth a somewhat closer look.

In it, he states that "[t]wo of my students reported to me" that Valdivia had assigned Rodman to coach the brass section for the orchestra's Brahms *Requiem* performance even though, according to the students, Rodman admitted to the group "that he did not really know the work that well." "My students also reported that the sectional was therefore something less than valuable," continues Kodner's letter.

That letter also recites that another student had reported that Valdivia "was mistakenly directing horn students" how to transpose. According to Kodner's letter, "When the students attempted to correct him, he reportedly became angry," insisting that his way was correct. In addition, a different transposition problem encountered by a fourth student is recited in Kodner's letter. As to that, the letter states that there had been two separate occasions when that fourth student had complained to Kodner. On one of those occasions, he reports to Kelly in his letter, Kodner had photocopied material obtained at the listening library, "detail[ing] the proper translation and interpretation of various musical terms," and had given the photocopies to that student to show to Valdivia. "Yet Hector again insisted that he was correct and continued to resist following [the student] in these portions of the concerto," Kodner states.

An additional experience with yet a fifth student also is related in his January 22 memorandum to Kelly. This situation involved the student's audition for the orchestra. According to Kodner's letter, "I phoned Hector and suggested that [the student] be allowed to play Assistant Principal horn," describing to Valdivia the asserted common practice of using five horns in college and community orchestras, but that suggestion was "dismissed" by Valdivia with the result that the student "decided to discontinue her French horn studies."

Obviously, Kodner's letter reveals that he had been engaging in more than surface discussions with students who were complaining about Valdivia. In her September 9, 1996 letter to Diekman, reviewed in subsection A, McKinsey stated, "since students are intimately involved in our review process, and, since applied music instructors have access to students in a private teaching situation, the potential for an applied music instructor to affect the review process inappropriately is obvious." Her letter went on to admonish Diekman that, "[I]f you hear complaints *from* students, you know the proper procedures: you should urge them to follow up themselves with the relevant faculty, or you should refer the issue to the department chair. You should not mediate yourself, nor should you add fuel to the complaint."

From his own descriptions to Kelly in his January 22 letter, that is precisely what Kodner appears to have done with some of these students when they complained to him. Yet, so far as the evidence reveals, Kelly made no effort to ascertain the extent of discussions which had occurred between Kodner and these five students, some of whom were identified by name in Kodner's letter. Nor is there evidence that Kelly made any recommendation, at least during the winter and spring of 1996, that Kodner should be disciplined for such seemingly more than passing interaction with students.

Third, as a result of Diekman's complaint to Mork about Valdivia, McKinsey, and Kelly met with Diekman on January 30, 1996. That meeting is described in further detail in subsection H., infra, which covers Diekman's relationship with Valdivia. In this subsection, there is one aspect of that meeting which is pertinent. Diekman testified, without contradiction by either McKinsey or Kelly, that, "[t]oward the end of the meeting . . . I said 'Steve, will you recognize TAFC'" and he said "Yes", and I said "Will you sit down and talk with us in good faith" and he said "Yes." In fact, thereafter Respondent did begin dealing with TAFC.

By memorandum to Kelly dated February 12, 1996, Diekman asked that a meeting be scheduled. Kelly returned that memorandum with a handwritten request, at the bottom, for "a range of times during the weeks of 2/26 [and] 3/4," and asking, also, "Could you also let me know what you want to meet about?" Eventually, that meeting did occur, on March 5, 1996.

Attending for TAFC were Deichert, Diekman, and Kodner, while Kelly and Archbold, presumably in his capacity as applied music program administrator, were also in attendance. TAFC had prepared an agenda, covering essentially the topics of mileage allowances and applied music faculty pay rates. That was presented to Kelly and Archbold. From the descriptions of Kodner, Diekman, and Kelly, these subjects were discussed and, so too, were chamber music guidelines, pro rata pension and medical programs and, possibly, tenure.

E. TAFC's Communications with the FAC

Kelly testified that he had felt that the March 5 meeting had been constructive. Later that same day TAFC prepared a communication to Kelly, thanking him for the meeting, expressing appreciation for "the constructive tone of today's meeting" and stating that TAFC was "look[ing] forward to similar such constructive meetings in the future." As that communication went on to state, however, and as Kodner and Diekman testified, satisfaction with the meeting was not truly the reaction of the TAFC representatives.

Kodner testified that while, during the March 5 meeting, Archbold had "said he thought there was [sic] some things in here [TAFC's agenda] that were of merit or that were worth discussing," Kelly had seemed to feel that "he had done all he could for us in these areas and didn't feel that he could do any more." Diekman testified that, "Larry [Archbold] seemed genuinely interested. I mean he made notes and a few com-

ments. Steve basically said "We don't have any money in the budget. The college won't go for this. The college won't go for that."" Of course, those types of refrains are hardly ones that are foreign to seasoned negotiators, nor are they hardly ones which are unusually heard during collective-bargaining negotiations.

In addition, TAFC's March 5 letter to Kelly continued, after thanking Kelly for a "constructive" discussion during the meeting, by stating:

> Our concerns over various departmental and College-wide issues which have arisen during the current academic year has prompted us to submit a memorandum to the Carleton Faculty Affairs Committee. Please find enclosed a copy of that memorandum and supporting documentation.
>
> We hope you will understand the spirit in which this memorandum was written. This memorandum is not intended to be a condemnation of the Music Department or its policies, but rather is a sincere expression of our concerns for the future of the applied music and ensemble program at [Respondent].

The "enclosed . . . copy of that memorandum" is from TAFC's members Deichert, Diekman, and Kodner. It bears the date "February 27, 1996."

With respect to that date, Kodner and Diekman testified that the memorandum had been prepared, over "six to eight weeks," according to Diekman, but had been withheld until the results of the March 5 meeting could be ascertained. "If the meeting was good then we would not have submitted the report," Diekman testified, "but after discussion the three of us . . . decided because while the meeting was cordial and it was constructive . . . nothing substantive ever got discussed . . . and we thought the best thing to do would be to submit this report."

As to the origin of the idea for approaching the FAC, both Diekman and Kodner testified that such a course had been suggested by chemistry professor, and FAC-member, Carlin. "[H]e told us to make out a detailed report and submit it to his committee for consideration," testified Diekman. According to Kodner's somewhat more detailed account, Carlin "encouraged us to do this and told us that he thought that FAC could be of help to us" and "thought that they could again act as a moral force and bring some pressure to bear in a positive way upon the department and the Dean if necessary." Of course, as described in subsection A, the FAC is an integral component of Respondent's procedures for disputes resolution.

Carlin appeared as a witness for Respondent. He testified adversely to Diekman in several respects. In fact, in a handwritten note to McKinsey following her September 5 meeting with Diekman, Carlin wrote, "I will back your decision and the process that led to it *all the way* on this oneincluding the lawsuit if and when it comes to that." In short, Carlin was not a witness disposed favorably toward Diekman nor, even, neutral about the outcome of this proceeding. Yet, he did not dispute the testimony by Diekman and Kodner that he had been the one who had recommended that they approach the FAC, as a means for resolving the adjunct faculty's problems with the music department. Indeed, at one point Carlin freely admitted having done so.

The content of the 28-page TAFC memorandum to the FAC is significant, inasmuch as it eventually became one of the five areas covered during the September 5 meeting, as noted in subsection A, above. McKinsey asserted that the memorandum contained "many overstatements and misstatements concerning the music department and its leadership that were inflammatory and unsupported by evidence." In the final analysis, however, she never identified with specificity the exact statements in that memorandum to which she had been referring, save for one that she mentioned to Diekman during the September 5 meeting. In consequence, while some inaccuracies in the memorandum can be discerned from the evidence presentedsuch as the department's unwillingness to address adjunct faculty's complaintsthere is no particularized evidence as to which specific statements in that memorandum had concerned McKinsey. Instead, one is left to try to figure out, through inference from other evidence, what she considered to be "overstatements and misstatements . . . that were inflammatory and unsupported by evidence."

It is settled that it is a respondent "alone [who] is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions." *Inland Steel Co.*, 257 NLRB 65, 65 (1981). That burden is hardly satisfied by unparticularized generalities which leave it to a trier of fact and reviewers to parse through a long communication in an effort to parse out what they may think was specifically on a respondent's mind in arriving at a decision to institute disciplinary proceedings against an employee. In the final analysis, that would be substituting their opinions for those of the respondent and the Board prohibits its administrative law judges from pursuing such a course. See, e.g., *Super Tire Stores*, 236 NLRB 877 fn. 1 (1978). In the interest of completeness, nevertheless, more than passing attention must be paid to TAFC's memorandum to the FAC.

TAFC's memorandum to the FAC begins with a preface which states, contrary to the memorandum of that same date to Kelly, "we believe that we have exhausted all possible options in our attempts to address these issues within our department." Under that preface, the memorandum is divided into sections entitled: "History," "the Situation at Present," "Why Should Adjunct Music Faculty Have Input into Music Department Matters?", "Are Classes in Music Performing Taken Seriously at Carleton?", "What Does an Adjunct Music Faculty Member Earn at Carleton?", "Has the Music Department-sanctioned "Adjunct Faculty Concerns Committee" (AFCC) Fulfilled its Mission to Promote Adjunct Faculty Concerns?", "Remedial Suggestions," and "Conclusion."

The "Remedial Suggestions" section begins with a review of the preceding year's survey and summary of its results, then states, "We would welcome the opportunity to open a dialogue with the music department, or the college, regarding the following proposals[.]" A number of those proposals obviously pertain to terms and conditions of employment: consultation with adjunct music faculty before new policies are devised which affect them, negotiation of compensation for services other than duties encompassed by adjunct faculty contracts, setting hourly pay rates which would make Respondent a leader among comparable institutions, adding labor union membership and employment status to Respondent's discrimination and academic freedom statement, free election of representation by adjunct faculty, equal adjunct faculty access to facilities, information and forums for discussion of adjunct faculty concerns and needs, mention of the role of adjunct faculty and of a procedure for adjunct faculty to bring grievances in the faculty handbook, and consideration of reevaluating Respondent's "posture to-

wards adjunct faculty, including pay, equivalency of teaching hours and benefit equity issues."

Other recommendations might be viewed as being outside of Section 8(d) of the Act's "wages, hours, and other terms and conditions of employment" framework for obligatory bargaining: a role in selecting ensemble directors and new adjunct faculty to fill vacancies, involvement in ensemble auditions and consultation about student section-seating in ensembles, encouraging and facilitating private applied music study and student participation in chamber music groups and performing ensembles, and institution of a program, which would include adjunct faculty, for recruiting talented students for the applied music program and ensembles.

The above-quoted headings for other sections of TAFC's memorandum to the FAC are rather self-explanatory. The text under those headings contains sometimes accusative and provocative language. In a few instance, the language could fairly be characterized as a "cheap shot." Under the "History" heading, for example, the following statements appear:

> Beginning with the June 1, 1995 meeting, it became apparent that the music department had adopted a thoroughly combative and defensive attitude towards our committee and its efforts to provide input by adjunct faculty into department matters which directly concern them.
>
> ….
>
> Our duly-elected committee members have also experienced discrimination and pressure from the music department, including a reduction in chamber music and ensemble coaching assignments, simply because of our efforts to form such a committee and to attempt to represent our colleagues and communicate their wishes to the department.
>
> . . . .
>
> [The January 30 meeting with McKinsey] essentially became a referendum on the adjunct instructor's union affiliation and his demeanor towards the music department chairman.
>
> Under "the Situation at Present" appears the following statement:
>
> Carleton professes to be an institution which values diversity, which encourages dialogue and free expression of a wide variety of opinions, and which places a high value on academic freedom. The music department appears to be testing the College's commitment to these lofty ideals. We were astonished that the music department chose to attempt to interfere with our efforts to elect adjunct faculty representatives and to form a committee. We were similarly astonished when the department attempted to set substandard wages for performing, an activity not stipulated by our contracts, in direct violation of union regulations. Has Carleton developed an anti-union bias? Carleton is supposed to be an educational institution. Carleton is not Hormel.
>
> The issue of how Carleton deals with its adjunct and part-time faculty is more global than the dispute within our department suggests. Carleton must not permit its adjunct faculty to be treated as an underclass, without voice or rights. Dean McKinsey stated in her letter to our committee members that "Carleton intends to be fair in all our personnel and compensation practices". Indeed, we agree that fairness is the issue here. Carleton is treading dangerously close to abandoning its professed commitment to fairness in its dealings with adjunct faculty.

Later in the memorandum, under "Why Should Adjunct Music Faculty Have Input Into Music Department Matters?" there appear the following statements:

> The authors of this letter have never encountered a prospective student, or a parent of a prospective student, who inquired about the name or credentials of the Music Theory professor, or the professor who teaches Music History.
>
> . . . .
>
> It appears that some aspects of the music performing program at Carleton appear to be drifting perilously close to mediocrity.
>
> . . . .
>
> We have been told that compensation paid to instructors of applied music is paid entirely from student lesson fees and thus falls outside the budget. One must ask, where does all the money go?
>
> Carleton, as a rule, goes to considerable lengths to select its faculty from among lists of candidates who are chosen for their superior qualifications. Whether or not the music department adheres to the same high standards is questionable. In early 1989, two candidates auditioned for the position of adjunct faculty flute instructor. At that time, input was at least sought from other applied music faculty before such a position was filled. One of the two candidates played well and was eventually hired. The other candidate played very poorly, prompting the question from other adjunct faculty as to why such a mediocre candidate had progressed so far through the selection process before being eliminated from consideration. Adjunct faculty were told by the department chairman at that time, Harry Nordstrom[,] that the less qualified candidate "is a nice woman and she lives in Northfield, so we wouldn't have to pay her mileage to teach here." Are similar criteria employed in the selection of faculty in other departments at Carleton, such as Chemistry or English?

TAFC's memorandum continues with statements similar to those quoted above. For example, at the expense of flogging a dead horse, there appear such statements as, "While "Carleton is not a conservatory," neither should it be a corner music store which specializes in teaching beginners," "Adjunct faculty contracts are carefully crafted in order to preclude the possibility that an adjunct instructor might attain what the College considers a half-time teaching load," "Adjunct music faculty at Carleton are apparently not the overpaid, greedy *idiots savant* that some in our department have portrayed them to be," and, "the logic inherent in the Kelly Compensation Study would make him worthy of a cabinet level position in a hypothetical Steve Forbes administration."

Perhaps the most provocative statements in that memorandum are those appearing in the "Conclusion" section:

> In short, we went through the various appropriate channels of communication during the last ten months. We were cautious and diligent. We played by the rules.
>
> Our reward for these efforts has been far less than gratifying. Members of this committee have been misled,

> threatened, lied to, lied about and scolded by various parties in the course of our meetings and discussions.
>
> . . . .
>
> Other comparable institutions have applied and performance programs which are not an embarrassment to those institutions.
>
> . . . .
>
> Are adjunct music faculty upsetting the "pecking order" at Carleton by asking to be represented? Is there some sort of caste system which the music department chairman is attempting to preserve here? From all appearances, the answer is yes.
>
> . . . .
>
> How does the College react to the efforts of our department chairman to silence our duly-elected committee by replacing it with a "department-sanctioned" committee? Does physical interference by the music department with our access to facilities and information qualify as "interference with…rights of free inquiry and expression"?
>
> . . . .
>
> We feel that members of TAFC have experienced such discrimination at the hands of individuals in our department, including the past and present department chairmen. These individuals have willfully and knowingly created a workplace atmosphere for members of this committee and others that is decidedly hostile and counterproductive.

Of course, there also are many statements in TAFC's February 27 memorandum which make factual assertions. These are too numerous to quote. However, as pointed out above, the significant point about them is that, save for one about "voice mail access," the official who claims to have made the decision not to extend another contract to Diekman, McKinsey, identified no particular statement either during her meeting with Diekman on September 5, 1996, nor during this proceeding, that she had relied upon as being overstated or misstated.

Kelly's reaction to TAFC's memorandum was expressed in a handwritten memorandum to McKinsey dated March 8, 1996. In pertinent part, that memorandum states, "this memorandum represents a few good points surrounded by a sea of misinformation, vague charges and red herrings. I assume FAC will want to waste its and my valuable time with a response." For some reason not explained by Kelly, or by any other witness for Respondent, a copy of that handwritten memorandum was attached to TAFC's February 27 memorandum and placed in Diekman's personnel file.

In fact, the FAC did choose to respond to TAFC's memorandum. It convened a meeting on April 30 attended by Diekman and Kodner. Some of TAFC's complaints were discussed. Uncontroverted was Diekman's testimony that FAC members said, "what we want . . . for you people is intervention and mediation" between TAFC and the music department "to iron out our differences," a "cessation of personal attacks and cheap shots, that our union local be respected and that there would probably be an outside review of the music department next year." Also undisputed was his testimony that the FAC promised to have TAFC elevated to the same status as other committees at Respondent and to monitor its election for representatives during the next fall term.

By letter to Kelly dated May 31, 1996, however, the FAC's then-chairman, Finholt, stated that "you and I and Dean McKinsey reviewed this situation together," but that the FAC has "no power to deal with any aspect of this situation." The latter remark by Finholt has been left unexplained by the evidence. Finholt did not appear as a witness, though there is no representation or evidence that he had been unavailable to testify. Given Carlin's description of the FAC's role in Respondent's disputes resolution procedures, set forth in subsection A, there appears no reason that the FAC would not have at least some "power to deal with . . . this situation[.]"

Indeed, Finholt's letter goes on to state "some suggestions that we hope might ease some of the tensions that exist." As to those, the letter opines that "establishment of an adjunct committee is an important step forward," adding that, "[I]t is important that this committee become an effective voice for all adjunct music instructors and that it be recognized by both the regular music faculty and the adjuncts as such." Finholt suggests procedures for conducting elections to that committee which "should meet several times a year without the presence of any regular Music Department member," and that it should "meet several times with the Chair of the Music Department or his/her designee."

Finholt's letter is typed formally. However, near the top of it is handprinted "DRAFT." No one explained who had done that. Nor was there an explanation of what had been meant by it. McKinsey asserted merely that it had been a draft document. Kelly testified that, "Mr. Finholt said that this was going to be the basis for a discussion when I received it and called him." However, Kelly did not testify that he had ever made such a call. There is no other evidence of such a call having been made.

McKinsey agreed with the letter's statement that she "had discussion with Professor Finholt about his conversations with Mr. Diekman, with Mr. Kelly, and all of the issues involved and he discussed it with me but I had not seen this draft," which is not surprising since it had been sent only to Kelly. Nevertheless, from her testimony it is evidence that McKinsey had been made aware during the spring of the unfolding events concerning TAFC. Further, she testified, "I had talked to Jim in the summer as he turned over the committee to the new person who was Bill Titus and Jim [Finholt] characterized that as unfinished business that he had not made a response." So far as the record discloses, no response to TAFC ever has been made by the FAC. In fact, with Finholt's letter, the evidence concerning TAFC and its interaction with Respondent comes to a conclusions.

F. Diekman's Threat to Withhold Grades

Aside from having included Hamilton's name on TAFC's October 30, 1995 memorandum to Kelly and from the statements made in TAFC's February 27, 1996 memorandum to the FAC, McKinsey's September 9, 1996 letter to Diekman also specified, as one area of conduct "you took last year that undermined our program," a threat by him, made on March 13, 1996, to withhold grades until his mileage payment was received. As to that charge, her letter goes on to state, "to hold students hostage in a situation caused by an inadvertent glitch in the business operations of the college is not consistent with normal professional behavior for faculty. It violates the commitment to students we expect from our faculty." In fact, there is no dispute about the fact that Diekman had made such a threat.

Adjunct faculty contracts with Respondent provide for payment of mileage by the end of the term. Normally, those checks were being disbursed during the second full month of

every term. But, during the last approximately two years prior to 1996 the checks had been issued later in the term, near the beginning of examination week.

During the winter term of 1996 the checks had not been issued by the beginning of examination week. Indeed, they had not been issued by 2 days before the conclusion of examination week. After that week, there would be a 2-week vacation until the beginning of spring term.

Some of the adjunct faculty entitled to mileage checks began discussing their concern about not having received those checks. Diekman called Respondent's business office and was told that the computer was "down," with the result that the mileage checks would not be issued for another 2 or 3 weeks. According to Diekman, he and Kodner discussed the situation and decided"Not as a committee thing. Just as individuals," Diekman testifiedto inform Respondent that they intended to withhold their grades until the checks were received. Though he appeared as a witness for the General Counsel, however, Kodner did not corroborate the portion of Diekman's testimony that Kodner had said that he would withhold grades.

In fact, Diekman did make a call and leave a voice message that he intended to withhold his grades until he received his mileage check. He claimed that Kodner had said that he also had called and delivered a like ultimatum. But, Kodner did not corroborate that testimony; did not testify that he had told Diekman that Kodner had made a threat to Respondent, by voice mail or otherwise, to withhold his grades. Nor did Kodner testify that he, in fact, did make such a threat to Respondent, although the record reveals that Kodner had made a call complaining about not having received his mileage check. Indeed, so far as the evidence shows, no other adjunct music faculty member ever threatened to withhold grades unless the mileage checks were forthcoming.

In the end, the checks were rushed to disbursement and Diekman timely submitted his grades. Diekman admitted that it had been neither the students' nor the music department's fault that the checks had not been issued timely. He further conceded that had he not issued grades, it would have been students who would have been affected adversely. In short, he never disputed Kelly's testimony that "obviously the student's [sic] concern had nothing to do with either the payment or nonpayment on time of anything and it was in a sense holding the students hostage to a personal grievance he had." It also could be said that Diekman's threat was akin to a sit-down strike or plant takeover, conduct which is not protected by Section 7 of the Act. See, e.g., *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1930).

Still, so far as the evidence shows, the only thing that Kelly did about it at that time was to write a note stating that Diekman and Kodner had complained, and that Diekman had "threatened to withhold grades if mileage was not paid," with that note being placed in Diekman's personnel file. As with the early fall of 1995 report by Hamilton, discussed in subsection C, Kelly neither disciplined, nor took action to have disciplined, Diekman at the time of learning of the latter's threat to withhold grades. No other official of Respondent did so. Nor, for that matter, was Diekman even spoken to about the impropriety of such conduct.

G. Diekman's Communications with Students

In her September 9 letter to Diekman, described in subsection A, McKinsey complained about remarks assertedly made by him to students concerning Validivia and the music department. In the course of doing so, she stated, "It is never appropriate to complain to students about other faculty or the department." Doing so, her letter continued, "puts students into a very vulnerable position, coercing them to take sides in an issue about which they have limited knowledge. In addition, involving students in personal disputes is destructive to the department's program." No exception can be voiced to such an explanation. What is a problem is whether it can be said that Respondent actually did possess evidence of improper communications to students by Diekman, falling within the scope of McKinsey's complaint, and, beyond that, whether the evidence which it possessed was not somewhat stale by September of 1996. Furthermore, in light of Kodner's more detailed acknowledgment of his discussions with students, as described in his memorandum of January 22, 1996, discussed in subsection D, there is an additional issue of disparate treatment of Diekman.

Respondent follows a policy whereby, when a student complains about another faculty member, the faculty member to whom that complaint is addressed is supposed to tell the student to try to work it out with that other faculty member. If that proves unsuccessful, or if the student feels uncomfortable doing so, then the student should be advised to bring the problem to the department's chairperson. As McKinsey stated in her September 9, 1996 letter to Diekman, "You should not mediate yourself, nor should you add fuel to the complaint."

By September 1996, Kelly had prepared two handwritten memoranda. One is dated "5/27/96" and states that a student "told me that one of the reasons she dropped lessons with Karl were his complaints to her about the department." The other memorandum is dated "6/4/96" and states that another student "said in a meeting with me today that Karl Diekman told her that Hector did not pay him for a coaching session. I don't know why Karl would be discussing financial arrangements with the college with a student." As to that question, there is no evidence that Kelly ever made any effort to ascertain the answer.

Events underlying the later incident provide certain background information of use in assessing the May 27 student complaint. By six-page letter to Kelly dated June 1, 1996, the student, a graduating senior, virtually trashed Valdivia and his work, accusing him, among other matters, of creating "a strong sense of rivalry among the [orchestra's clarinet] players," as well as "a strong degree of uncertainty and a feeling of powerlessness", of harboring a "lack of respect" for students, and of lying. The letter also makes two statements about Diekman.

First, near the letter's end, the student recites how, as a result of Valdivia's asserted conduct during her orchestra audition, she had quit playing "my clarinet for months." She then states, "If it was not for the support that my clarinet instructor Karl Diekman has given to me over the years here, I truly believe that I never would have played again." The second statement is made earlier in the letter, in the course of discussing an incident when she had been purportedly compelled to abandon a chamber music group for which Diekman served as instructor. According to the letter, Valdivia "also promised Mr. Diekman that he would pay him for his trip to [Respondent]. He never paid Mr. Diekman."

The letter concludes by requesting a meeting with Kelly. The former student was not called as a witness. So the only evidence of what had been said during that meeting is the tes-

timony of Kelly. That testimony was quite brief concerning the time spent during that meeting discussing the student's complaints about Valdivia. In fact, Kelly described no more than that he had explained to the student that chamber music policy is established by the music department, not by Valdivia.

As to the letter's statement about Diekman not being paid, however, Kelly appears to have displayed greater interest. "I asked her how did she know that Mr. Diekman was never paid for this chamber—for this trip down to Northfield and she said Mr. Diekman told her," Kelly testified. Yet, Kelly never claimed that he had inquired of the student about the circumstances under which Diekman had made that statementduring a lesson or during some conversation elsewhere, as a volunteered remark or in response to the student's question about whether Diekman had been paid, during a discussion critical of Valdivia or as a casual comment.

With respect to the above-quoted May 27 memorandum by Kelly, he testified that the student had requested a meeting during which she extolled Valdivia's handling of the orchestra and the changes which he had instituted. According to Kelly, the student had added that she had stopped taking lessons at Respondent and had taken them elsewhere, thereby foregoing credit by Respondent for those lessons. Kelly testified that he had asked the student why she had done so and that she had replied, "she just had a general dissatisfaction with the quality of instruction." Apparently, Kelly did not pursue that reply. Instead, he testified, "I asked her if Mr. Diekman had ever complained to her about the department," and, "she said yes; he had." But, Kelly never explained what had led him to abruptly ask that particular question. Certainly, a complaint about "quality of instruction" does not naturally suggest that there had been complaints about the department by Diekman. Beyond that, it appears that Kelly had displayed greater interest in that student's remark about Diekman than had been displayed about the other student's complaints about Valdivia. And, Kelly never testified that he had pursued the student's affirmative answer to the question about Diekman complaining about the departmentnever testified that he had asked her what complaints Diekman had voiced, nor about the circumstances under which Diekman had expressed his complaints.

There is another perhaps an even more significant aspect to the student's complaint about the quality of Diekman's instruction, which Kelly memorialized in his memo of "5/27/96." When asked during direct examination when the student – a graduating seniorhad ceased taking lessons from Diekman, Kelly responded, "I'm actually not sure. It was at least a couple of years." When that point was pursued during cross-examination, Kelly testified, "I didn't know the time lag between when she had studied with him and the current time," and, eventually, "I knew it had been some time. I knew it was at least a year. I didn't really check on it." In fact, it is uncontested that the last time that student had received instruction from Diekman had been during the fall of 1992, when she had been a freshman.

H. Diekman's Relationship with Valdivia

It hardly seems understated to say that, following Valdivia's arrival at Respondent during the fall of 1994, he and Diekman developed a genuine dislike for one another. More than one witness tried to explain the origin of that antipathy. On Diekman's side, it appears to have arisen, at least in part, from the fact that prior conductorsmost recently, Paul Ousley for 1 year and, before that, Jeanine Wagarhad been more willing to consult with adjunct music faculty about ensemble decisions. For example, Kodner acknowledged that, "in discussion" with Diekman, dissatisfaction had been expressed about Valdivia exercising his discretion as orchestra conductor differently than had Wagar and, moreover, that Diekman had been disappointed that Valdivia was not so deferential toward adjunct faculty as had been prior conductors. Indeed, Diekman testified that "up until Mr. Valdivia cam there [orchestra conductors] relied on us private teachers' input into sectional seating in orchestra," though he then denied that he had been disappointed that Valdivia had not given as much weight to adjunct faculty opinions.

For his part, Valdivia testified that, during the fall of 1994, he had given Diekman a list of items to cover during a sectional rehearsal. Afterward, testified Valdivia, Diekman "informed me that he had only covered the first item on the list," but not the others. Called during rebuttal, Diekman admitted that he had "opted to put one down really well than to go through all three and not effect much of an improvement on any of them""hopefully there would have been another sectional and I could have maybe touched on the pieces then depending—I think that's what went through my mind at the time," Diekman tried to explain.

During the spring of 1995, Valdivia testified, he had assigned a sectional to Diekman, but, "Mr. Diekman failed to show up." Diekman agreed that the incident had occurred, claiming, "I think that was a communications mix-up and I thought he had canceled it." Yet, Diekman did not explain with particularity what supposed "communications mix-up" had purportedly led him to conclude that the sectional had been canceled.

As spring term of 1995 neared conclusion, according to Valdivia, he had handed out music for the following year's contemporary festival of Karl Kohn music. It was performance at that festival which would lead to the January 2, 1996 telephone conversation mentioned in subsection D. Valdivia testified that when he had given a solo clarinet piece to Diekman, he had asked that Diekman examine it during the summer "and let me know what he thought of it, if he felt he wanted to perform it and how much money he would like for that service, and to let me know early in the fall." However, Diekman never got back to him, testified Valdivia, with the result that he concluded that Diekman "did not want to play the piece."

Diekman agreed with those facts, but testified that he had been "under the impression until we had our January 2nd phone call that I was to perform that piece." In fact, Diekman testified, it had been in anticipation of that performance that he had placed that call to Valdivia.

According to Diekman, he had placed the call to do no more than inform Valdivia that he and six other side men scheduled to perform were entitled to Musicians Union pay scales for their performances. Diekman testified that when he had said as much, Valdivia "lost his temper and said that I had no right to tell him how much—tell him how much how to—tell him how much to pay people." According to Diekman, "I kept my cool. I tried to reason with him. I said "Hey, you know, I just want to be sure that things go by the book here in the Northfield Local now. You are employing musicians." And so we kind of went around. It was a fairly short conversation," during which, "I invited him to call my union secretary if he had any questions."

Diekman claimed that, "the most upsetting to me was the way he spoke to me on the phone. I have never been spoken to like that in my 13 years there ever by anyone," and that "one of my concerns on January 2nd when we had our phone conversation was that myself and other union musicians" might not be paid "up to union scales for these works." In fact, Valdivia described a request by Diekman, during the January 2 conversation, which went beyond merely providing information about rates to be paid for performing during the festival.

According to Valdivia, Diekman "wanted to know the salary or pay for the performers for the contemporary festival." When he responded that such information was confidential, as it is under Respondent's policy, and that he did not set pay scales, but the department did so, Valdivia testified that Diekman "told me that I'd better tell him and that they had better be at union scale. I asked him whether or not he was threatening me and he said 'Yes.'" "I told him that if he had further concerns that he shouldn't call me at home but direct them to the chair of the music department," testified Valdivia.

Actually, in testifying about this conversation both during the General Counsel's case-in-chief and during rebuttal, Diekman never denied specifically having "wanted to know the salary or pay for the performers" from Valdivia,. As pointed out in subsection D, there is no evidence that Musicians Union has ever been the statutory representative of adjunct faculty in Respondent's music department.[4] Still, it is possible that Valdivia had merely misheard Diekman's request – that, assertedly still believing that he would be performing during the festival, Diekman had been seeking to ascertain solely the rate at which he would be compensated for that performance, instead of the rates which were to be paid to other adjunct faculty performers. However, that is simply not a plausible possibility in view of some of Diekman's own subsequent statements, discussed below. Rather, the evidence supports Valdivia's testimony that Diekman had wanted to be told the rates which would be paid to other adjunct faculty who would perform at the festival.

y memorandum to Director of Personnel Services Mork dated January 3, 1996, Diekman complained to her about Valdivia "before pursuing other remedies." In that memorandum, he claimed that he had telephoned Valdivia "to assist him in the drafting of contracts with several music faculty members" for the festival, but that his call had been "received with contempt, anger, and a total lack of respect. Mr. Valdivia stated that "what I pay people is none of your business." After voicing a number of complaints about the situation, Diekman concludes his memorandum by saying, "I will expect to hear from you, in writing, regarding your suggestions for dealing with this matter." Significantly, if one reads the entire memorandum, it is difficult to credit even Diekman's above-quoted testimony that, during his January 2 telephone conversation with Valdivia, "I kept my cool." To the contrary, his seeming inability to be able to do so appears to have created some of the problems which he has encountered.

Diekman's January 3 memorandum to Mork was passed on to McKinsey who, in turn, decided to meet with Diekman and Kelly. Before that meeting could took place, however, two other incidents occurred. First, TAFC jumped into the Valdivia fray, by sending its January 15, 1996 memorandum to Ellinger, mentioned in subsection D, concerning student chamber ensembles policies.

Second, by memorandum to Diekman dated January 22, 1996, Mork gave notice that his "specific complaint about Professor Valdivia" had been forwarded to McKinsey. She also stated that as to pay levels and structures, "ultimately the College must decide what it is willing to pay its employees and other performing services" and that Respondent "considers its financial arrangement with its employees and other third parties to be confidential information." Her memorandum concludes: "However, you should not feel compelled or pressured to perform services for wages that you feel are insufficient or that violate any other obligation you may have. If you are asked to participate, but choose not to, [Respondent] will endeavor to find a replacement."

Apparently unwilling to allow any perceived slight to remain unrequited, Diekman replied to Mork's memorandum but, not until March 1, 1996, approximately a month after having met with McKinsey and Kelly. The text of that memorandum to Mork is instructive in evaluating Diekman's testimony about his demeanor during events covered by this proceeding:

> Your memo of January 22nd states, "ultimately the College must decide what it is illing to pay its employees and other performing services". I believe you are in error here. It is the employee of the College who must ultimately decide whether the "level of pay" which the College offers for such services is acceptable to him or her.
>
> The policy which you quote is in direct conflict with the legal rights of musicians' union members who work for the College. That policy (as you interpret it) is also a possible violation of various labor laws. I sincerely hope that you will consult with legal counsel to the College before continuing to interfere with the rights of [Musicians Union] members to conduct themselves in accordance with their own by-laws and rules.
>
> Your comment that "the College will endeavor to find a replacement" in the event that musicians' union members feel they have been offered subscale wages or work which violates the terms of their union membership is a serious concern. This appears to be a threat on the part of the College to circumvent [Musicians Union] members and to replace them in performance situations with non-union musicians. I have forwarded a copy of your memo to Russell Moore and Brad Eggen at the [Musicians Union] for appropriate action by our union.
>
> Frankly, I am disappointed at the sarcastic and confrontational tone of your memo, Bonnie-Jean. I came to you for help with a problem. I expected better than this, especially from you, but from the college as well.

It, perhaps, bears repeating that, while at least some of Respondent's adjunct music faculty are members of Musicians Union, there is no evidence that the latter is the statutory bargaining agent of any of Respondent's faculty.

The January 30, 1996 meetingwhich, as mentioned in subsection D concluded with Kelly agreeing to recognize TAFC, but not Musicians Union – was attended by McKinsey, Kelly, and Diekman. Each testified about what had been said. According to Diekman, the initial approximately 20 minutes were absorbed by McKinsey's questions regarding Musicians Union, such as about the role of its business manager. Then, he testi-

[4] The Act does not obligate an employer, however, to comply with a request for information from a union that is not the statutory representative of the employer's employees." (Citation omitted.) *Howell Insulation Co.*, 311 NLRB 1355, 1356 (1993).

fied, "We finally got around to talking about Hector's—my problem with Hector or Hector's problem with me."

In reality, Diekman never did describe what had been said about those subjects during that meeting. Furthermore, though called as a rebuttal witness, he never disputed the accounts of McKinsey and Kelly as to what had been said during the January 30 meeting. Instead, he described only, in essence, his own reaction to what was said to him by Respondent's two officials: "I felt that they were looking at me like I was almost out of line for bringing the complaint." Diekman did testify that there had been discussion of his perception that his assignments had fallen off, with Kelly saying that "the reason I wasn't doing any coaching was because I was requesting more mileage than the flat $25.00 fee and they had gotten someone else to do it."

Kelly did not deny having said that. He testified that, "the purpose of the meeting was to hear his [Diekman's] complaint and discuss the issued raised in his letter [to Mork]." McKinsey stated that her goals had been "to hear him out. I wanted to hear more about his complaint and his situation and his perception of things," so that possibly "I could help mediate and help preserve and heighten the kind of collegiality that he felt had been breached," as well as to "address a couple of specific issues." Still, she testified, "I was actually surprised and quite struck by the fact that Mr. Diekman kept introducing more aspects of his complaint about Hector."

Both she and Kelly testified that Diekman had voiced a series of complaints about Valdivia, going beyond what had been said during the January 2 telephone conversation. Thus, by way of illustration, McKinsey testified that Diekman had complained about "[t]he way [Valdivia] chose people to be in the orchestra, the way he decided how many students to have in the orchestra." And, Kelly testified that Diekman had complained about, "Mr. Valdivia's running of the chamber music program" and "the way that Mr. Valdivia was assigning the players in the orchestra."

Significantly, when called during rebuttal, Diekman never disputed Kelly's testimony that, during the January 30 meeting, Diekman had complained "that in the [January 2] conversation Mr. Valdivia had refused to divulge to him what other parties at the college were going to be paid. . . ." Nor did Diekman dispute McKinsey's testimony that he had explained that "the reason he had asked Hector those questions about wages was that he felt entitled to by the" Musicians Union. In short, Diekman's undisputed words during the January 30 meeting tend to support Valdivia's testimony that, during their January 2 telephone conversation, Diekman had demanded to know the rates at which other adjunct music faculty would be compensated for the festival.

McKinsey testified that, during the January 30 meeting, she had "assured [Diekman] that we intended to pay union wages with respect to the" Musicians Union. Furthermore, both McKinsey and Kelly testified that, when Diekman had mentioned a student's complaint, he had been told that whenever students voiced complaints, that student should be told to work it out with the faculty member and, if that was not a comfortable course, for the student to take the complaint to the department chair.

If nothing else, the January 30 meeting provided another opportunity for an exchange of correspondence. By letter to Diekman dated February 8, 1996, among other statements, McKinsey thanked him for having attended the meeting, said that she had spoken with Valdivia who expressed surprise at being called on January 2 "soon after 8 a.m. at home," and pointed out that Diekman should now be aware "that no one at [Respondent] will talk with any employee about what another employee is being paid and I hope you will not continue to ask anyone to do so." The concluding paragraph of her letter states:

> Karl, I know you have been a very valuable teacher for our students for a number of years, and I am very concerned about the level of anger and frustration I heard in your voice during our meeting. The department has made some changes in the structure of our instrumental programs in the past few years and change is not always easy. I hope you can adapt in ways that will allow you to continue to be an effective member of [Respondent]'s musical staff.

Eventually, Diekman replied to her letter, on March 1, 1996. He asserted that his call to Valdivia had not been made until 10:56 a.m. on January 2, and attached "a photocopy of a PBX telephone record, obtained from [Respondent's] Telecommunications Department" to support that assertion. He then states:

> It appears that Mr. Valdivia has deliberately misled you about my phone call to him on January 2, 1996, presumably in an attempt to make me appear unreasonable and unprofessional in this matter. I am shocked at Professor Valdivia's dishonesty and at his willingness to hide behind this falsehood in an effort to somehow deflect criticism from his inappropriate conduct towards me. To quote the Faculty Handbook, "Academic honesty is demanded in a college community."

Diekman's memorandum to McKinsey continues, "I have read and re-read the Faculty Handbook and all other materials which the Music Department and the College has provided me," but "cannot find any mention of a policy which forbids me to inquire whether musicians' union scales are being paid to fellow members in good standing of that union." His memorandum's concluding paragraph states:

> Finally, I was most disappointed that our meeting in your office on January 30th, which originated with my complaint about discrimination and harassment by a fellow faculty member, became instead a referendum on *my* behavior in this matter. It also appears that my affiliation with the musicians' union was a concern during that meeting. If the College policy towards adjunct music faculty who happen to be union members is in conflict with state and federal labor laws, then I suggest that you consult with legal counsel to the College about possible changes in those policies.

McKinsey testified that the memorandum had concerned her because "the time of the phone call was not at all the point. The point was Hector's manner and his intention in the phone call and the way that Mr. Diekman heard it." She further testified that she also had been concerned about his assertions pertaining to his affiliation with Musicians Union which, testified McKinsey, "was not at all a concern of mine." She made those points in a memorandum to Diekman dated April 1, 1996, pointing out that it was not "the exact time of your phone call" which had been a concern and, further, that "We expect to pay at least union rates when we hire union members to perform," and that "you are not "forbidden" to ask about wages, but you

must not taken anyone's refusal to answer as "discriminatory" or "harassing"; it is rather a normal response consistent with their professional responsibility to observe confidentiality."

Apparently, Diekman did not reply to McKinsey's April 1 communication. So far as the record discloses, that concluded the correspondence campaign arising from the January 30 meeting. Still, one other aspect of that meeting should not pass unnoticed.

Kelly testified that, during that meeting, "Mr. Diekman seemed quite angry and upset" when voicing his complaints against Valdivia. McKinsey testified that when Diekman had complained about Valdivia, during the meeting, "he seemed very emotional. He raised his voice and it seemed excessive to me." In fact, she testified that, "I was worried about his ability to participate in the program and to really be collegial in the way that he [sic] wanted to be." In addition, Kelly testified that the meeting did "[n]ot really" appear to resolve Diekman's anger. Nonetheless, there is no evidence that Respondent's officials pursued any actions following the January 30 meeting to avoid or, at least, minimize further friction between Diekman and Valdivia, save for below-described conversations with Valdivia.

Kelly and McKinsey each conducted a separate meeting with Valdivia. McKinsey testified that, during her meeting, Valdivia "assured me that he had meant no disrespect to Mr. Diekman, and I was quite satisfied with his response that he had certainly not intended to create a rift." During the meeting with Kelly, both men testified, Kelly reviewed Diekman's complaints and Valdivia said that he had not meant to slight Diekman. Kelly stressed to Valdivia the importance of mutual respect among faculty, testifying, somewhat at odds with his asserted feelings described in the preceding paragraph, "I had hoped they'd be able to work together and work things out." In short, McKinsey and Kelly's testimony about each's attitude in the immediate wake of the January 30 meeting was not consistent with the adverse reaction which, each claimed when testifying, had been left by Diekman at the January 30 meeting's conclusion.

Valdivia testified that, following the January 2 telephone conversation, he began to notice that students, "particularly in the clarinet" sections, were becoming "disruptive" during rehearsals. He mentioned that to Rodman and, according to Valdivia, Rodman "informed me that that term Mr. Diekman had informed him that he [Diekman] was going to do everything he could to get rid of me at" Respondent. During a later luncheon with Bryce, testified Valdivia, "When I told him about Ron Rodman's conversation with me he [Bryce] was struck by this and informed me that he had a similar conversation with Karl during which many questions were asked about the tenure process, and then Karl Diekman informed Jackson Bryce similarly that he was going to do everything he could to get rid of me."

Valdivia testified that, "I spoke with the chair of my department and the dean of the college" about what he had been told. Asked what responses they had given him, Valdivia testified, "I was assured that I would get a fair review and that we were trying to—they recommended [to] me to try to do my best to help smooth out the situation." That advice seems somewhat tepid given the seriousness now portrayed by Respondent of any effort to undermine a faculty member's effort to achieve tenure and, moreover, McKinsey and Kelly's above-described testimony that, after the January 30 meeting, each had felt that the problem between Diekman and Valdivia rested, in essence, with Diekman. Seemingly, it hardly made sense to lay on Valdivia the burden of "smooth[ing] out the situation."

Still, though McKinsey agreed that, during April, she had met with Valdivia who was upset about the "threats," his students' conduct, and "the undermining activity [that] was going on," she did not contest Valdivia's testimony about telling him to try "to help smooth out the situation." Neither she nor Kelly described any action involving Diekman taken in response to hearing reports of one faculty member having threatened to undermine the efforts by another faculty member to attain tenure.

Nor was any immediate action taken when they received reports from Rodman and Bryce about threats by Diekman to affect Valdivia's ability to obtain a favorable third-year formative review. Rodman testified that, during November of 1995, he had been told by Diekman, during a private conversation, "that he was going to get Valdivia," because "he didn't like him."

Bryce described a luncheon with Kodner and Diekman, during late February or early March 1996, when the two adjunct faculty had solicited his signature on a card for Musicians Union. As he and Diekman walked out together, testified Bryce, Diekman "asked the kinds of things that go into the [tenure and promotion] decision, who makes the decision and he was particularly interested in what kind of information we got from students." According to Bryce, when he responded that a great deal of information was solicited from students, Diekman "wanted to know how seriously" student responses were taken, and Bryce told Diekman "we read them very carefully over and over again and took them very seriously." At that point, Bryce testified, Diekman "seemed to be delighted with this news that there would be student input and said something to the effect of 'Boy, there is something that we can do about that[.]'"

At first, Diekman denied flatly that he had asked Bryce about the tenure processpointing out in doing so, "I know student input is sought as part of the tenure review process. Why would I have that conversation with him? It never happened." Yet Diekman did admit that, on the supposedly one occasion during "the whole school year" when he had seen Bryce, "we asked him to sign a card." Moreover, having initially denied "Absolutely not" that he had stated to Bryce an intention to do something about Valdivia's obtaining tenure or planning to get rid of Valdivia, Diekman later backed down from that denial by testifying only that he "recall[ed] making no such statements to Professor Bryce" about an intention to improperly interfere with the tenure effort of Valdivia.

Interestingly, that answer, which Diekman confined "to Professor Bryce," was made in response to a question naming both Bryce and Rodman. As to the latter, Diekman testified that he had remarked to Rodman, before calling Valdivia on January 2, "Well, it wouldn't break my heart if he didn't pass his third year review." Asked specifically about Rodman's account of what had been said during the preceding November, Diekman first evaded by answering, "I don't know how I could do it. I don't have the power. As an adjunct faculty member I don't have that input," but allowed as to Rodman's description of the November 1995 threat, "I didn't say that he made it up."

More will be discussed in the succeeding subsection about Rodman's and Bryce's testimonies concerning those asserted remarks by Diekman. For the moment, the important point is that Bryce testified that, on a day after his (Bryce's) conversa-

tion with Diekman, Valdivia happened to mention "the clarinet section and the horn section and I made an immediate connection" to what Diekman had said earlier: "I connected this—this possibility of something going on with the students in the orchestra with this conversation that I've just related to you [with Diekman while walking out from lunch] which came back to me in a flash." So, testified Bryce, "I shared it with … Mr. Valdivia right there in the conversation," and, "I later discussed it with the dean of the college and—Elizabeth McKinsey and with Stephen Kelly."

In relating these events, Bryce made no mention of Rodman. He testified that it had been merely Valdivia's remark about problems with "the clarinet section and the horn section" which had led him to mention what had been said to him by Diekman. As set forth above, however, Valdivia testified that it had been Rodman who first "informed me that that term Mr. Diekman had informed him that he was going to do everything he could to get rid of me at" Respondent. As also set forth above, Valdivia testified that he had mentioned that comment by Rodman to Bryce and, then, the latter had related the "similar conversation" with Diekman in which he (Bryce) had participated. Yet, Rodman advanced a sequence of events which is at odds with Valdivia's account that he first had been told by Rodman, before then speaking with Bryce, about a threat made by Diekman.

Rodman testified that he had begun observing "signs with some clarinet students in the ensembles that something may — may be amiss," and, then, "I became more aware when I talked to Jackson Bryce about this," and "learned that the threat had been made—had been made known to Jackson Bryce as well." Under Rodman's version, accordingly, it had been Bryce's relation of a threat by Diekman which led him to report a similar earlier threat by Diekman. In contrast, it had been Rodman's relation of that threat to him which had led him to speak with Bryce, Valdivia testified, then learning of a similar remark by Diekman to Bryce. Yet, Bryce gave no testimony whatsoever about Valdivia having said anything to him about Rodman having heard a threat by Diekman. And it should not escape notice that Bryce claimed that Valdivia had expressed concern about both the clarinet and horn sections of the orchestra, whereas Valdivia testified, as described above, that he had mentioned to Bryce only orchestra disturbance by the clarinet students.

To be sure, all of the foregoing might be patched and melded together to form some sort of coherent sequence of events. Indeed, all things considered, I do credit Rodman and Bryce that Diekman, obviously given to articulating his feelings of adversity toward Valdivia, had made the statement which each professor described. Yet, even were one to assist Respondent to construct a logical chain of events which led Valdivia to speak with McKinsey and Kelly about his formative review, there are certain more significant problems raised as a result of scrutiny of Rodman's and Bryce's communications with Respondent about Diekman and, then, concerning their testimony about those communications and what they had heard Diekman say. Those subjects are discussed in the following subsection.

In this subsection, the remaining pertinent consideration is that even though Kelly and McKinsey had been aware of threats by Diekman directed to Valdivia's effort to achieve tenure, there is no evidence that either dean or chairman made the slightest effort to approach Diekman about such conduct which, according to McKinsey's September 9 letter to Diekman, "is a most serious breach of professional behavior." Given that asserted seriousness of such a threat, presumably some action would have been taken to ensure that no conduct by Diekman to implement it was taken during the remainder of the Spring 1996 term. Yet, so far as the record shows, neither official approached Diekman about the subject prior to the Summer of 1996.

I. Events Prior to September 5, 1996

Even before that summer certain events relating to Diekman began unfolding. Specifically, certain paperwork began to be accumulated by Respondent. Chronologically, the first document is dated "15 April 1996," and is a letter to Kelly from Rodman. Kelly testified that it had been received by him after Bryce had orally reported what Diekman had said while walking with Bryce from lunch, as described in the preceding subsection. Indeed, Rodman's letter does begin with Rodman stating, "In response to overhearing the conversation about Karl Diekman's statements about Hector to Jackson Bryce, I will add what I know of the situation." Of course, that sentence is somewhat at odds with Valdivia's testimony that it had been a report to him by Rodman, about Diekman's threat, which had led him to speak about Diekman to Bryce. Here, however, the more significant point about the letter is that it states both more and less than what Rodman testified Diekman had said about Valdivia.

With respect to the "more," as set forth in subsection H, when testifying about Diekman's November 1995 remarks, Rodman claimed that Diekman had said only "that he was going to get Valdivia" and "didn't like him." Yet, in the letter to Kelly, Rodman attributes additional purported statements to Diekman which were not a part of Rodman's testimony as to what Diekman had said during that November conversation: that Diekman "explicitly stated to me that he was offended by the "aloofness and arrogance" of Hector and other members of the full-time faculty, especially you and Larry." Even though shown the letter as he testified, Rodman gave no testimony whatsoever about Diekman having said anything, during that conversation, about "the full-time faculty," nor about "especially you and Larry." So far as Rodman's testimony goes, Diekman had complained during November 1995 only about Valdivia.

In addition, the letter continues by suggesting, "Perhaps it would be a good idea for either you or the Dean ton [sic] conduct some third-party interviews with some of Karl's (and Eric's) students" to "assess the potential damage to our ensembles and the applied music program as well as serve as a step toward rectifying the situation." As pointed out above, apparently neither Kelly nor McKinsey were sufficiently concerned during the Spring about such "potential damage" as to follow up on that suggestion.

The significant point at this stage, however, is that, when testifying, Rodman never explained why he had chosen to include Eric Kodner's students among those whom he was recommending be interviewed. Rodman gave no testimony about any threats by Kodner similar to what Diekman had said during November 1995. At no point did Rodman assert that Diekman had said that Kodner, also, wanted to get rid of Valdivia. In fact, as set forth in the preceding subsection, Rodman confined his own observations about disturbances in the orchestra to "some clarinet students[.]"

Of course, Bryce testified that he had been told by Valdivia about disruptive behavior by students in the orchestra's "clarinet section and the horn section." But, Valdivia never testified that he had complained to Bryce about students in "the horn section." And, Valdivia never claimed that there had been disruptive conduct by students in that section. Rather, in describing the disruptive conduct, Valdivia specified only "the clarinet sections[.]" In consequence, left unexplained is Rodman's inclusion of TAFC-member Kodner, along with TAFC-member Diekman, in the April 15 letter to Kelly.

With respect to the "less," Rodman's April letter is significant for a particular omission when compared to his testimony. As quoted above, the letter suggests interviews with students to assess potential ensembles and music damage caused by "the present situation." In the letter Rodman did not identify any particular student who might be interviewed. But, he suggested one supposed possibility while testifying. For, he claimed that there had been remarks made by a clarinet student which assertedly had caused him to be concerned.

According to Rodman, during a rehearsal on some unspecified date, the unidentified student "asked me about my tenure situation" and, also, "asked when Hector Valdivia would be up to tenure," saying, in response to Rodman's question, "Well, Karl and I were talking about this in our clarinet lessons." Accordingly, testified Rodman, "I was concerned that perhaps Karl was making good on his threat through—by undermining Hector to students, particularly his clarinet students." However, neither in his April 15 letter to Kelly nor, so far as the evidence reveals, on any other occasion during the spring of 1996 did Rodman see fit to report to Kelly, or any other official of Respondent, what that clarinet student had purportedly said. His failure to do so, given his letter and the concern which he asserted while testifying that the student's remarks had caused him, gives rise to an inconsistency between his testimony about that supposed remark by the student and his letter to Kelly.

"If a witness fails to mention facts under circumstances which make it reasonably probable he would mention them if true, the omission may be shown as an indirect inconsistency." *Esderts v. Chicago, Rock Island & Pacific R. Co.*, 76 Ill.App.2d 210, 222 N.E.2d 117 (1966), cert. denied 386 U.S. 993 (1967). There can be no ambiguity, arising from that case, that the Supreme Court does endorse the principle that an inconsistency arises whenever a witness testifies about a fact omitted from a previous account of the same incidentthat is, by a "previous failure to state a fact in circumstances in which that fact naturally would have been asserted." (Citation omitted.) *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980). Having gone to the trouble of memorializing in writing Diekman's November threat, and having also gone to the trouble of suggesting "interviews with some of" Diekman's students, it seems illogical that Rodman would not also have brought that student to the attention of Respondent, had there been an incident such as Rodman testified had occurred.

The date of Rodman's letter is significant in evaluating the course followed by Bryce regarding the threat which he heard Diekman make about Valdivia. Rodman testified that it had been Bryce's description of those remarks by Diekman which had led him (Rodman) to prepare the April 15 letter to Kelly. Kelly testified that "the conversation with Mr. Bryce was first," before Rodman's letter. However, Bryce did not prepare a written account of what he had been told by Diekman until he sent a letterto Kelly, McKinsey, and the FAC chairman, Finholt – dated May 22, 1996. That means that Bryce had prepared and transmitted that letter more than a month after he had made his asserted "immediate connection" between what he was being told by Valdivia and what he had been told by Diekman. That hiatus gave rise to additional disparity between testimony of witnesses for Respondent.

Kelly testified that when he had been told by Valdivia what the latter had heard from Bryce, "I asked Mr. Valdivia to have Mr. Bryce call me," and, when Bryce had done so, "I asked [Bryce] to put his concerns in writing." As to Bryce's delay in doing so until May 22, according to Kelly, "it just took him a while to get the written document to me." Of course, there is a certain facial logic to that explanation. But, it suffers somewhat from the fact that had Bryce been so concerned about Diekman's threat, as he testified that he had been, then it seems somewhat odd that it would take him so long to document that asserted concern. Beyond that, Bryce gave a very different explanation for not having prepared his letter until late May – one that made no mention of being requested by Kelly to "put his concerns in writing."

Asked what had led him to prepare the letter, Bryce testified, "Well, *I eventually decided* that that would be the best way to get my recollection down in as concrete manner and useful manner as possible. . . ." (Emphasis added.) In short, Bryce testified that the decision to memorialize Diekman's remarks about Valdivia had been his (Bryce's) own, omitting mention of any request by Kelly that the account of those remarks be reduced to writing. In addition, Bryce never explained why he had chosen to send copies of that written account to McKinsey and Finholt, as well as to Kelly.

It is also significant that Bryce's letter covers more than merely remarks about Valdivia made by Diekman. Before reciting those remarks, Bryce's letter reports that, "towards the end of this past winter term," Diekman and Kodner "urged me to sign a small card requesting [Musicians Union] to organize [Respondent] as a union location." That portion of the letter continues, "I could not understand what it was for, and … I was miffed at being told to sign something whether I understood it or not." Both Bryce and Kelly denied that the latter had requested the former to include such information in the written account of Diekman's remarks about Valdivia. Indeed, asked if he had even discussed with Bryce matters other than those remarks about Valdivia, Kelly answered, "No, I did not."

Bryce, however, was more equivocal when responding to that same question: "I may well have done. I'm not—I'm vague about that." Of course, he may not have discussed it with Kelly. He may have discussed it with McKinsey, to whom Bryce testified that he also had spoken before having prepared the letter. But, she never testified with particularity as to what had been said to her by Bryce, leaving the record with Kelly's denial and with Bryce's equivocal, "I may well have done" so. Moreover, the record is also left with no explanation by Bryce as to why, if he had been doing no more than creating a "concrete" and "useful" account of Diekman's reference to Valdivia, he had chosen to also include an account of the organizing campaign on behalf of Musicians Union.

After mentioning the organizing campaign on behalf of Musicians Union, Bryce's letter recites what Diekman had said, as he and Bryce were walking "alone" out from the building, as described in subsection H. Bryce then states in his letter, "I have more recently heard from Hector about what he perceives as a campaign on Karl and Eric's part to undermine our stu-

dents' trust in him. . . ." Yet, as pointed out above, at no point when testifying did Valdivia claim to have become concerned about being undermined by Kodner. Nor did Valdivia describe any undermining conduct having been conducted by Kodner's students.

In the next paragraph, Bryce opines that, during "the last eight years or so," Diekman has begun displaying a "somewhat inappropriately intense" interest in his students, through "smothering attention he was giving to his students" and "trying to 'get a life' out of his clarinet students here—an effort doomed to failure in my opinion." "[S]ome of them appreciated it, others, I think, did not," continues the letter, and, "More recently he has become quite bitter that these efforts seem to have gone unappreciated by the Music Department, and I think his disappointment is a major ingredient of the current unrest." Bryce did not testify what he had meant by "current unrest."

Rodman's April 15 letter and Bryce's May 22 letter were followed by Kelly's memoranda of May 27 and June 4, described in subsection G, about his conversations with the two students. Also not to be overlooked is Kelly receipt during that same time period of Hamilton's to "Whom it may concern" memorandum of "5/21/96," described in subsection C. This propinquity is somewhat odd, given the periods covered by some of those documents and the many months preceding April 1996 which passed without any written documents about Diekman having been generated. Of course, the June 1 memorandum from one student was sent to Kelly and the other student's request for a meeting with Kelly during late May would be a natural occasion for a graduating student to express her overall evaluation of Respondent's program.

Even so, neither of those students said anything that would naturally be construed as a threat by Diekman against Valdivia's effort to obtain tenure with Respondent. Moreover, having heard about such threats during April and May – from Valdivia, from Rodman, from Bryce – it is also odd that Respondent took no action whatsoever before the end of the term to address the concern which those threats assertedly raised for McKinsey and Kelly. That would change during the ensuing summer months.

By memorandum to McKinsey dated July 17, 1996, Kelly states, "the Music Department makes a recommendation that the Dean of the College take disciplinary action against Karl Diekman, Adjunct Instructor of Music for unacceptable performance[.]" The five reasons listed for doing so are essentially identical to those enumerated in McKinsey's September 9 letter to Diekman: threats concerning the future employment of Valdivia, complaints about the department to the two students with whom Kelly had spoken, affixing Hamilton's name to TAFC's letter to Kelly of October 30, 1995, Diekman's March 13, 1996 threat to withhold students' grades if his mileage payment was not forthcoming, and the asserted "many overstatements and misstatements" in TAFC's "complaint" to the FAC.

Kelly testified that, during a department meeting at the end of the 1995-1996 academic year, he had "outlined my concerns about this behavior—these various behaviors to the full department and described the incidents," and that no one had objected to his proposal "that I would like to make a recommendation to the dean that some kind of action be taken." But, this testimony should not be construed as meaning that Kelly had recommended disciplinary action only against Diekman. For, he acknowledged that he also had been recommending "some kind of action be taken" against the other two identified TAFC members – Deichert and Kodner – as well.

With regard to those two adjunct music faculty members, Kelly's concerns had nothing to do with threats to undermine Valdivia's tenure-effort, nor with threats to withhold students' grades. And, with respect to Deichert, Kelly was not concerned about communications with students. Instead, his recommendation to take "some kind of action" against Deichert related exclusively to TAFC-related activities. Thus, in a memorandum to McKinsey, also dated July 17, 1996, Kelly recommended that Deichert be disciplined for having affixed Hamilton's name to the October 30, 1995 memorandum and for the "overstatements and misstatements" in TAFC's multipage memorandum to the FAC. In addition to those two reasons, Kelly recommended, in a memorandum to McKinsey also dated July 17, 1996, that Kodner be disciplined for "complain[ing] about the Department to students."

Dean McKinsey acted on all three of Chairman Kelly's above-described memorandums. Both testified that she felt that the situation was less one of administering discipline, than of trying to ensure that relations would be smooth during the ensuing academic year. In consequence, Kelly testified, "we thought the best situation was to try to rectify the situation and move on from here and get some assurance of professional behavior." Similarly, McKinsey testified, "I felt that—in discussion with Mr. Kelly I felt that discipline wasn't so much to the point," but rather "what we need to do was to talk to Mr. Diekman. My concern was that this kind of unprofessional behavior not continue and that before we gave him a contract for the coming year we should discuss these issues, these concerns, and be sure we were on the same page." Presumably the same reasons motivated her decision to meet with Deichert and Kodner, as well. But, in the final analysis, McKinsey never explained why she had chosen to meet individually with each of them, as well as with Diekman.

L. Preacademic Year Individual Meetings with TAFC-members

The three TAFC-member, adjunct music faculty instructors were contacted for individual pre-1996–1997 academic year meetings with McKinsey and Kelly. Due to their performing schedules, Kodner and Diekman were not available until September. Deichert was available to meet earlier. During the latter half of August 1996, he met with McKinsey and Kelly. As pointed out in the preceding subsection, he had been recommended for disciplinary action based only on his participation in affixing Hamilton's name to TAFC's memorandum of October 30, 1995, and for his involvement in TAFC's memorandum to the FAC.

McKinsey did not testify about her meeting with Deichert. Deichert did not appear as a witness, though there is no indication that he was not available to do so. Kelly testified only briefly concerning the meeting with Deichert: "we just talked about the—some of our concerns and he said "I'd like to move on from here. I have no disagreement about what the expectations are" and we have a very cordial conclusion to the meeting and he was given a contract." The record contains no particularized description of what specific commitments were sought from Deichert during the meeting. It contains no evidence about the specific discussions of his purely TAFC-related activities for which Kelly had recommended that he be disci-

plined and about which McKinsey had believed that it was necessary to meet with him.

McKinsey's next meeting with one of the three TAFC-members occurred on September 5, with Diekman. Kelly also attended that meeting. At Diekman's request, FAC-member Carlin attended, as well. All four of those individuals testified about what had occurred during the meeting. Based on that testimony, there were three general aspects of the meeting which are significant: the discussions about the five areas enumerated in Kelly's above-mentioned July 17 memorandum and in McKinsey's September 9 letter to Diekman; the substance and tone of certain statements made during the meeting by Diekman; and, the commitment(s) requested of Diekman and his response(s).

Before reviewing that testimony, however, certain related facts must be pointed out. By the time that McKinsey testified, her notes describing the meeting (G.C. Exh. 58) had been introduced. After their preparation on September 12, 1996, those notes had been reviewed both by Kelly and by Carlin. Conversely, during the post-September 5 meeting period, Diekman also had prepared notes describing the meeting (R. Exh. 2) and, in addition, had prepared an affidavit describing the meeting (R.Exh. 3) for his attorney. Review of the notes and affidavit reveal that, in each instance, they present events of September 5 in the light most favorable to the party on whose behalf they had been prepared.

Furthermore, their existence provided each side with a form of "dry run" regarding testimony that would be given during the instant proceeding about the September 5 meeting. That is, the testimony given on May 20 and 21, 1997, was not given on the basis of unaided recollection but, most importantly, was advanced after each side's witnesses had prepared or reviewed written accounts, favorable to that side, of the discussions during the meeting on September 5, 1996testified with the benefit of a carefully prepared, "neat condensation of," *United States v. Ware*, 247 F.2d 698, 700 (7th Cir. 1957); *United States v. Brown*, 451 F.2d 1231, 1234 (5th Cir. 1971), the facts as they most favorably portrayed that side's view of the meeting. It is not surprising, therefore, that their accounts during direct examination corresponded, for the most part, to those appearing in the preprepared notes and affidavit.

McKinsey testified that, after thanking Diekman for attending the meeting and assuring him that his mileage to attend would be paid, she reviewed the goals of the applied music program: "provide students with a very good musical experience and music education" during lessons, rely on those music lessons to support ensemble performances, and "to be part of supporting the overall goals of the overall program." Then, she began discussing the five areas.

Concerning what she had said to Diekman about those subjects, McKenzie did not testify with much particularity. Instead, her testimony regarding all five areas tended to focus more on Diekman's responses. Even so, McKinsey's notes disclose that with regard to Valdivia, she had said, "You made comments to two faculty members that you intended to work against Hector Valdivia's getting tenure here, to work to "get rid" of him," and had continued with an explanation of the reasons why such conduct would be unacceptable. In the process, according to her notes, McKinsey pointed out that Diekman's criticisms of Valdivia had "escalated beyond a reasonable and constructive level and became hostile and vindictive" during the past year and, further, that given student involvement in the tenure process and "since applied music instructors have access to students in a private teaching situation, the potential for poisoning the review process by an applied music instructor is obvious."

McKinsey testified that Diekman "did not respond directly," even though she "gave him a chance to disavow the threat if he—if the information had been wrong." Instead, she testified, Diekman "launched into more and more complaints about Mr. Valdivia as if to validate his threat, as if to say "yeah, of course."" Kelly essentially corroborated that testimony: "He went into a whole series of criticisms of Mr. Valdivia, how he was running the chamber music program and how the orchestra was being run and his [Diekman's] disagreement with him [Valdivia], and talking about how a number of the adjunct faculty were pissed off with Mr. Valdivia."

Diekman never disputed the foregoing accounts of McKinsey and Kelly. During direct examination, Diekman testified that when McKinsey had said that she found his conduct toward Valdivia disturbing, and accused him of disparaging Valdivia to students during lessons, he had responded "that if students have a specific complaint that I referred them to the department chairman or Mr. Valdivia for the complaint first. Either write a letter or a meeting or whatever the student was comfortable with." Later during direct examination, Diekman testified that he had said "unlike any orchestra conductor I've seen in my thirteen years at [Respondent] and I've been through four[,] that he has managed to quote "piss off just about everyone on the applied faculty.""

During cross-examination, Diekman admitted that, during this meeting, McKinsey had brought up his threats about Valdivia's tenure. Yet, asked if he had told McKinsey that he did not make such threats, Diekman answered only, "I don't remember what I said. I have to look in my notes. I don't remember exactly what I—what I said in the meeting unless I look in my notes. Nor well enough to just give you a yes or no to that question."

Diekman never asked to look at his notes. They would not have been much help to him, had he done so. For, although his affidavit prepared for counsel states, "the specific allegations they made against me are discussed in my notes of that meeting," only discussions during the meeting of the other four areas are covered in those notes; mention of the discussion about Valdivia is absent. Still, significantly, there is no evidence that either McKinsey or Kelly had identified for Diekman the "two faculty members" to whom they were asserting that he had made "comments" about Valdivia.

The second area pertained to Diekman's comments to students. McKinsey and Diekman agreed that this topic had been discussed during the September 5 meeting. However, as Kelly admitted, no students were identified by name for Diekman. Diekman did testified that Kelly had said "I have two student complaints" and had held up a sheet. But, "I didn't even see who they were from. I just saw the sheet being held up," Diekman testified.

McKinsey testified that "with the issue of complaining to students he didn't deny it," but "instead reiterated complaints about Valdivia," and her notes state that Diekman "changed the subject to say that they have complained to him." Kelly agreed that Diekman "responded by saying students had complained to him. He didn't really address the concerns raised by the dean."

Diekman testified that when McKinsey "brought up various things such as student complaints about me discussing depart-

mental matters and lessons," he had responded "that I hadn't during lesson time." Interestingly, such a response is not included in McKinsey's notes. Kelly equivocated, during cross-examination, as to whether such a statement had been made by Diekman: "I don't recall him saying that. I mean he may have said that. I just don't recall it."

Absent also from McKinsey's notes is any mention of a statement by Diekman to the effect that when a student complained to him, "I would always tell them to write a letter or have a meeting with the department chairman about it, or actually at first if they had a complaint about another faculty member to try and confront them first in a diplomatic manner." Yet, Kelly effectively corroborated that testimony by Diekman. For, while he complained that Diekman "didn't answer whether he had complained to students. He said that—he said that students had complained to him." Then, when asked if Diekman also had said that his practice was to follow departmental procedures whenever a student brought something to him (Diekman), Kelly conceded, "that's how he answered the complaint, yes." In other words, during the September 5 meeting Diekman had endorsed his observance of that procedure.

As to having Hamilton's name on the letter of October 30, 1995, McKinsey testified, "I think he said he had read the letter to Jim. Jim knew about it and said it was okay so there was a dispute about that." Kelly also testified that, "Diekman said that that letter had been read to Mr. Hamilton and that he had agreed with it over the phone and disputed the claim."

As a matter of fact, McKinsey's notes reveal that there had been more to Diekman's response in this area than either she or Kelly had described, when testifying as to what Diekman had said when confronted with the charge that Hamilton had not authorized having his name affixed to that memorandum. In pertinent part, those notes recite:

> This concern evoked a tirade about the Adjunct Faculty committee Karl had organized and the department's committee. He went on and on about the formation of the two committees, faulting the department for deliberately trying to undermine their committee and intimidating faculty who wanted to be on their committee [in fact, two adjunct faculty told the department chair that they felt intimidated by Karl and others into voting with them].

Still, the notes show that, during the September 5 meeting, Diekman had protested Respondent's reaction to the formation of TAFC, a reaction which did constitute improper conduct under the Act, as discussed in subsection B, above.

As to his March 13, 1996 threat to withhold grades, Diekman admittedly stuck to his guns about the propriety of such conduct, even though on this point he was not holding loaded weapons. Thus, he never disputed McKinsey's testimony that, "He didn't deny it and didn't acknowledge that that might have been an [sic] inappropriate, no." Her notes also state that Diekman had "exclaimed that we were going to violate our contract if we did not pay him the mileage payments "on time" as if to justify such a threat." Diekman's notes disclose that he had asked if McKinsey and Kelly would like to have their own checks delayed and, in any event, that the grades had been submitted on time, "SO NO ONE ENDED UP BEING INCONVENIENCED."

With regard to the final enumerated area, TAFC's memorandum of February 27, 1996, submitted to the FAC on March 5, 1996, McKinsey's notes summarize that discussion as follows:

> (5) "You and two others wrote a complaint to the [FAC], dated Feb. 27, 1996, in which you knowingly included many overstatements and misstatements concerning the music department and its leadership that were inflammatory and unsupported by evidence. Some of the charges were extremely serious, such as that you were "persecuted," "lied to," and "threatened" by the chair or other regular faculty, yet none of these was backed by evidence. Professional norms require that arguments and allegations be accurate, fair, and supported by evidence; this is particularly important within a college environment where one of our major goals is to teach students to make reasoned, accurate, and fair arguments and judgments."
>
> He became quite argumentative and demanded an example of a misrepresentation. Almost at random, I read the assertion that "after repeated requests, most adjunct faculty still have no voice mail." In fact, after one request the chair arranged for anyone who wanted it to get voice mail. Karl just proceeded to reargue all his grievances and raise new criticisms when we tried to pin him down on any specific one.
>
> I made a mistake and allowed him to drag me into the debate too far. But I pulled the conversation back to the general topic of our expectations of him as a professional music instructor. He sidestepped the question of professionalism and his obligations to the department and said only that "I feel a moral obligation to the people who elected me to the committee," i.e. a few other adjunct faculty, and "I feel loyalty to my students." When I tried to press him about professional behavior, he said he wanted to talk about his expectations which were that we would accept the intervention of the FAC (whereupon Chuck insisted that the FAC would not "intervene") so he revised it to say "recommendations" of the FAC and allow them to run a new election and mediate the disputes. I reminded him that FAC had made no recommendations.

In the final analysis, there really is no significant dispute concerning that account.

Turning to the second above-identified aspect of the September 5 meeting, McKinsey alleges in her letter of September 9 that Diekman had been "negative and confrontational," had "used sarcasm in describing departmental procedures," and had repeatedly "used profanity" during that meeting. Diekman claimed that, during the meeting, "I tried not to raise my voice and not to get excited. I tried to reason with her. I didn't want to go in there and threaten to sue. I just wanted to talk about things to see if we could iron things out." Still, during cross-examination when called as a rebuttal witness, Diekman conceded that he had become angry during the meeting. Moreover, his own conduct described in preceding subsections shows that he is possessed of a not terribly long fuse. In fact, he admitted having made some of the specific remarks attributed to him by Kelly and McKinsey. It is those admitted remarks to which McKinsey seemed to be pointing as "negative and confrontational" and as having been sarcastic statements.

For example, Diekman admitted that when the subject of selecting conductors had arisen, as both McKinsey and Kelly testified, he had said that rather than consult with adjunct music faculty, who were professional performers under various conductors, Respondent had chosen to consult with Bryce, a classics professor. Thus, Diekman admitted Kelly's testimony that

he (Diekman) had said, "I suppose a PhD in classics qualifies somebody for choosing a conductor of the Carleton orchestra."

Diekman also conceded that, during the discussions that day, perhaps while deriding the choice of Bryce as one of auditioneers of orchestra conductors, he had asserted that, among freelance musicians, Respondent's music program was the "laughingstock" of the Twin Cities. He did not dispute the testimony of Kelly and McKinsey that when the latter had challenged that assertion, Diekman had backed down somewhat, saying that maybe not the classroom aspect of the program, but that the performance aspect was so regarded. When McKinsey contested that modified assertion, Diekman admittedly became "a little bit frustrated" and retorted, "Well, you can say what you want but that's not what other people say," adding, "you can't put perfume on a pig."

Perhaps the most significant portion of the September 5 meeting arises from McKinsey's testimony that Diekman had used "profanity" during the meeting. Of course, that can be a relative term. Diekman admitted having used the term "piss off," as described above: that Valdivia "has managed to quote "piss off just about everyone on the applied faculty."

He also admitted having said "farting around." As to use of that phrase, he explained that, when he had said that "our concerns weren't being taken into account or listened to," Kelly had responded by saying, "We got you chalk for your blackboards. We got you clocks for your studios. We got you voice mail and we even spent a lot of money in putting a handsome hardbound cover on the adjunct faculty handbook." Diekman testified that he had replied, "Why are we . . .farting around with these small insignificant things when we need to discuss substantive issues such as curriculum, artistic input and working conditions." Apparently neither McKinsey nor Kelly regarded that terminology as particularly offensive. For, neither one of them mentioned that phrase as having been used by Diekman during that particular reply.

In fact, during direct examination McKinsey did not actually address the subject of what profane terms Diekman had purportedly uttered during the meeting. Pressed about the subject during cross-examination, by being asked directly to describe "all the profanity that you can remember in that meeting," she seemed to be struggling, not because of sensitivity about using such words, but to come up with even a single example of a "profane" remark which Diekman supposedly had made. She did claim eventually that Diekman had used the "f" word "at one point or two points," and also claimed that the "perfume on a pig metaphor while not using four letter words was—had the same import and even a bigger impact because it was a whole metaphor and not just a word." Pursued further about the subject of profane words used by Diekman on September 5, McKinsey testified that Diekman "used profane adjectives" and, asked then what they had been, testified finally on the subject, "such as fking, such as damn. I don't have a transcript." As she testified, McKinsey appeared to be searching for profane terms which she could attribute to Diekman, as opposed to making an effort to testify candidly regarding what he actually had said during the meeting.

Of course, available to her by that time were her notes of the September 5 meeting. Yet, neither adjective appears in them. As to that McKinsey testified, not without facial reasonableness, "I didn't have any inkling that I would need a direct transcript of it and I don't tend to write words like f–king in my notes[.]" Yet, the facial reasonableness of the second aspect of that explanation is undermined somewhat by examination of her notes, showing a fairly detailed description of supposedly improper statements attributed to Diekman during the September 5 meeting. The entire explanation tends to be further undermined by what happened when she circulated those notes to Kelly and Carlin, for their agreement to their accuracy.

Carlin declined to be included as "a signatory member of the group," given his attendance "as an observer of the meeting, representing the FAC at Karl's request," but he did point out in his handwritten response to McKinsey, "I will back your decision and the process that led to it *all the way* on this oneincluding the lawsuit if and when it comes to that." Even if the possibility of a legal proceeding, arising from not extending another annual contract to Diekman, had not occurred earlier to McKinsey, Carlin's handwritten comment certainly brought that possibility to her attention. Given that factand the added fact that there seems to have been no need for her to have rushed her notes to completion (indeed, they were not finalized until a week after the meeting with Diekman)– it would appear that McKinsey should have been on notice that she needed to prepare notes that were even more detailed than might be the need in other situations. That is, that she might well need to include in these particular notes matters that she ordinarily would refrain from including in her notes of meetings.

Those, however, are not the most significant considerations in connection with her testimony that Diekman had used the "f" word and "damn" during the September 5 meeting. A most significant consideration is that, when they testified about that meeting, neither by-then Acting Associate Dean of the College Kelly nor by-then sympathetic-to-Respondent's position Carlin mentioned the use of either one of those words by Diekman during the meeting.

With respect to commitments sought from Diekman by McKinsey and with regard to his responses, the third aspect identified above, she testified generally that, "I wanted Mr. Diekman to affirm those goals [of the department], to affirm that he was going to be part of it and get his contract for the coming year." Thus, she further testified that she had "asked him several times" to do so. But, testified McKinsey, at various points during the meeting Diekman "avoided my questions about professional standards" in connection with their discussion about Valdivia. In connection with his "laughingstock" and "perfume on a pig" comments, McKinsey testified that "he was not only evading my question about his commitment to the goals and to professionalism but he was deliberately using language that denied it."

According to McKinsey, she ultimately asked if Diekman "even want[ed] this job," and he retorted, "No, I don't. I replaced the income," but then added, "Well, I"ll see when I get the contract." McKinsey testified, "I asked him one more time would he affirm the professional goals and he sort of hesitated and then kind of waved his hand and said 'Oh, sure' like that in a way that was completely unserious," after which "Carlin said 'this doesn't seem to be going anywhere'" and I said "You"re right."

During cross-examination, McKinsey initially repeated the commitment that she had sought from Diekman: "my point is that he evaded my question and he evaded my request that he acknowledge the standards of professionalism in the professional behavior," but Diekman "kept evading that and going off into more and more emotional complaints." Of course, "standards of professionalism" is a somewhat ambiguous phrase. As

cross-examination progressed, McKinsey explained only, "In his interactions with his students and faculty."

In fact, Diekman acknowledged that when McKinsey had asked about "norms of professional conduct," she had said "toward faculty and students. Norms of Diekman conduct toward faculty and students." He further testified, "she asked me twice. I had gone off on a tangent the first time it was asked," adding, "As sometimes I am want [sic] to do." However, he claimed that eventually, "I said yes, that I would, yes." However, that testimony, given when he was called as a rebuttal witness, conflicted with his testimony, when he appeared as a witness during the General Counsel's case-in-chief. At that earlier point he testified that when McKinsey had asked "will you abide by professional expectations," he had "sort of avoided the question because I really didn't know how to answer it[.]" At another point he testified that when he was asked by McKinsey, "Do you want this contract," her remark had "sort of rubbed me the wrong way" and he had retorted, "I'm not some junior faculty member who will crawl over broken glass for his tenure."

Both Kelly and Carlin described questions put to Diekman by McKinsey concerning whether the former would made a commitment to act in a professional or collegial manner to colleagues and students. Carlin testified merely the Diekman had not responded "directly" to the question "will you behave in a professional manner towards your fellow faculty or words to that effect." However, Carlin did not describe what he had meant by the description of what Diekman had said – did not testify as to the specific words that Diekman had spoken in response to that question.

Eventually, Kelly was more forthcoming. During direct examination he testified that when McKinsey had asked, he believed "at least three times," if Diekman would "agree to treat your colleagues in a professional manner," Diekman had "never seriously addressed the concern." In other words, he gave the same ambiguous type of answer as the one described above given by Carlin. But, thereafter, he did acknowledge that, when asked if he supported the program, Diekman had answered, "Well, I'm loyal to the people who elected me to the adjunct faculty member [sic] and the students." In fact, McKinsey also testified that Diekman had told her that he felt "a moral obligation to the people who elected me to the committee" and, also, "to my students[.]" To be sure, that is a somewhat ambiguous response. But no more so than the question which led to it.

As to the meeting's conclusion, Diekman testified, as described above, that he did not intend to grovel for a contract. He further testified that Carlin had interjected, "Why don't you put your expectations of Mr. Diekman in writing when you send him his contract and he can sign that along with his contract," after which 'the meeting was at an end at that point." As discussed above, McKinsey testified that when Diekman had replied "Oh, sure" that he "would affirm the professional goals," Carlin had said, "this doesn't seem to be going anywhere[.]" Kelly confirmed McKinsey's testimony that, when asked if he wanted the job, Diekman had said that he had replaced the income and would "wait until I see my contract." While Kelly made no mention of Carlin's intervention, Carlin agreed with McKinsey that he had "said something about I didn't think this was going anywhere or I guess words to that effect."

In fact, Kelly had brought Diekman's 1996–1997 contract to the meeting, as he also had done when the meeting with Deichert had occurred earlier. Kelly testified that, before the September 5 meeting had commenced, he had fully intended that the contract would be tendered to Diekman at the end of the meeting. However, Kelly testified that he withheld its tender in view of the events which had occurred during that meeting.

McKinsey testified that, throughout the rest of that day and during the night, "I thought a lot about it" and concluded the next day that "it was an unavoidable decision" to not extend a contract to Diekman. She explained that "by what he said, by the way he said it, by what he failed to say again and again and his manner in doing so it seemed to me that he was not serious about being part of the enterprise of our music department," with the result that "to be responsible to the faculty and to the students in the department I needed to make that decision." She admitted that her decision not to offer a contract to Diekman had been based on what had occurred during the September 5 meeting: "that's right."

As to the specific events of that meeting which had concerned McKinsey, she testified that she had not been concerned with Diekman's professional manner related to his role as an adjunct faculty member in Respondent's music department: "My concern was the way he was interacting with students and with his colleagues." She further testified that she had regarded the five enumerated areas of concern in descending order of importance. Thus, she explained, the threats against Valdivia were "one of the most serious beaches of . . . collegiality first, of professional relationships with students, the idea of poisoning students' relationships with another faculty member, and therefore of the purity of the tenure process, the review process."

As to statements to students, McKinsey explained that, in view of Diekman's "one on one relationship" with students during lessons, "if there is some kind of ulterior motive or something inserted into that relationship it can be devastating and indeed we had a couple of complaints from students about that." Of course, it should not pass without notice that the student complaining about Valdivia had not actually complained to Kelly about Diekman's remark about not being paid by Valdivia. And the other student had complained about the quality of Diekman's instruction, not about comments he may have madeat least, not before Kelly had suggested that area to her, as described in subsection G. above. As to the threat to withhold grades, she testified that Diekman "shouldn't implicate students in that kind of a dispute."

McKinsey advanced the following explanation about her concern with having affixed Hamilton's name to the October 30, 1995 TAFC memorandum: "that seemed to me to be a breach of professional conduct. If academic honesty and integrity is part of what we are trying to teach using someone else's name is not consonant with that." With respect to TAFC's memorandum to the FAC, McKinsey testified:

> the issue that I took with that was the inflammatory language and exaggerated language that was used in couching the issues. It was a very—uncollegial is an understatement -- document. It is full of deliberate misstatements and exaggerations and overstatements that were very serious that were very serious charges, very inflammatory, and I was concerned about that.

Interestingly, McKinsey made no mention whatsoever of having conferred with anyone else in reaching the decision not to extend a 1996–1997 contract to Diekman. That would not necessarily be surprising, given her position as the ultimate authority on faculty discipline and discharge. But, Kelly testified that he and McKinsey had discussed the situation during the morning of September 6, 1996. It is not evident why, if her decision had been a proper one, McKinsey would have omitted mention of that discussion.

During it, Kelly testified, he had said, "I didn't see how [Diekman] would remain an effective member of the department," in light of "Karl's lack of commitment when he was asked if he would be willing to treat his colleagues in a professional manner and his lack of support for the program," as shown by Diekman's comment about being loyal only to the adjunct faculty who had elected him and to his students. That testimony, and the very fact that he had conferred with McKinsey before she made the decision to not extend a contract to Diekman, makes it important that Kelly's motives be considered.

Like McKinsey, Kelly expressed concerns with "any attempt to subvert" the tenure process, with students being drawn into disputes between faculty, as well as between faculty and the department, and with the adverse affects on students of having their grades withheld as part of a dispute between a faculty member and Respondent. As to Hamilton's name being included on TAFC's October 30, 1995 memorandum, Kelly testified, "Well, it's obviously a breakdown of respect for colleagues if you attach someone's name to a document that he has not seen or signed himself."

With respect to TAFC's memorandum to the FAC, Kelly testified, "My concern was that the document itself not only contained a number of factual errors, exaggerations, assertions without evidence, but showed a general lack of respect of the music program." He further agreed with the suggestion that it had contained matter in the nature of "cheap shots" and went on to testify:

> Well, I didn't like it but there was—there was information in thein the report that was untrue and the writers of the report knew it wasn't true as well as I said these exaggerations and unattributed statements and so on. It seemed to violate what wewhat would be acceptable as normal discourse on issues at the college and between colleagues.

Both he and McKinsey testified that they had regarded Diekman's words on September 5 as hostile and offensive.

Because it is relied on as a comparison with Diekman's fate, the September 6 meeting with Kodner must also be reviewed, though more briefly. McKinsey, Kelly, and Carlin attended that meeting. McKinsey gave no testimony regarding what had been said during it, though her notes were introduced as an exhibit. Kelly and Carlin gave minimal descriptions concerning what had been said during the meeting with Kodner. In consequence, Kodner's description of the discussions during that meeting is uncontested.

As set forth above, Kelly's July 17 memorandum to McKinsey had recommended that Kodner be disciplined for comments to students, for including Hamilton's name on the memorandum of October 30, 1995, and for TAFC's memorandum to the FAC. Kodner testified, and McKinsey's notes disclose, that all three subjects were covered during this meeting.

With regard to the complaints to students, McKinsey's notes state that she had said to Kodner, "You complained to students about the department to the point that they asked you to stop, which was documented last spring," but that Kodner denied having done so, asserted that he had "no time in a 30-min. lesson for such conversation," and said that when he had heard complaints from students he had "followed procedures outlined by Steve in his letter to us," although he conceded that he had tried to address one student's complaint about Valdivia's asserted "erroneous" transposing instructions. According to McKinsey's notes, Kodner said, "I can assure you I have never initiated such a conversation with students."

Interestingly, so far as the evidence discloses, Respondent never produced the assertedly "documented" complaint by students, as had been done during Diekman's meeting when Kelly had displayed, apparently, his handwritten memorandums concerning what he had been told by students on May 27 and on June 4, 1996, as described in subsection G. Of equal interest is the fact that, while Kelly obviously possessed Kodner's memorandum of January 22, 1996, described in subsection H, nothing was said, so far as the record shows, about that memorandum during McKinsey's September 6 meeting with Kodner, even though that letter appears to disclose considerably greater interaction with a larger number of students than was engaged in by Diekman. Instead, Respondent's officials merely accepted Kodner's denials, through they had not been willing to extend like acceptance to Diekman's assertion that he had not discussed Respondent during lessons with students.

It is quite clear from McKinsey's notes that there had been a discussion of Valdivia during the September 6 meeting. For, those notes state that Kodner had complained about liking "to not feel he's team-teaching with Hector. Getting two different version[s] was too confusing to students." However, there is no evidence that those remarks by Kodner had led McKinsey or Kelly to seek assurances from Kodner that he would not disparage Valdivia to students. Rather, the notes recite only, "steve replied that that was very reasonable."

Nor, so far as the notes and other evidence reveals, were Respondent's officials concerned when, the notes recite, Kodner "raised the question of general attitude and asserted that there was more camaraderie when Jeanine [Wagar] was here, with "better rapport between ensemble leaders and applied teachers." Now he feels a lot of aloofness," and added "Hector's very defensive." In short, as had Diekman, Kodner had complained about Valdivia and, as set forth in subsection H, Bryce testified that Valdivia had complained about disturbances by students in the horn, as well as the clarinet section, of the orchestra and Rodman had suggested, in his April 15 letter, that students of both Diekman and Kodner be interviewed to "assess the potential damage to our ensembles and the applied music program as well as serve as a step toward rectifying the situation." Yet, there is no evidence that any commitments concerning Valdivia had been sought from Kodner, as had been the fact with Diekman during the preceding day's meeting.

Particularly illuminating is a portion of the description in McKinsey's notes of her conversation with Kodner about Hamilton's name on TAFC's memorandum of October 30, 1995. In those notes, she recites that Kodner "disputed" the assertion that Hamilton had not approved the memorandum. The notes on this subject continue:

> Eric disputed this and said "we called Jim on a speaker phone and I was present. I believe he knew and approved what was

> in the letter. Jim is being disingenuous." And he offered to get a list of his phonecalls [sic] that would include the one to Jim. He went on at some length about the election of the two committees and how confusing it was and how abruptly Jim resigned. He then went into a thing about how Jim and Liz [Elizabeth Ericksen] felt pressured by the department to resign. Steve disclaimed any pressure and Eric said it was obvious that people would FEEL pressure in such a situation even if Steve hadn't intended to put on any pressure.

Apparently, McKinsey was satisfied with that explanation. Yet, 3 days later she would include in her letter to Diekman continued criticism of having included Hamilton's name on the memorandum of October 30, 1995, even though both Diekman and Kodner had disputed the assertion that Hamilton had not approved including his name, and despite Kodner's offer to provide some proof of prior communication with Hamilton about the memorandum.

Also significant is a portion of her notes pertaining to Kodner's responses to the third complaintthe contents of TAFC's memorandum to the FAC:

> He said maybe the document was a case of "too many cooks." At the time they didn't think it was misleading. "We had what we thought was evidence. We didn't know the process. We probably were trying to get attention." He then went on the talk about meeting with the FAC. "I thought the FAC understood us. They asked us good questions; they challenged us. I felt I was dealing with wise colleagues." Then he went on to say he thought writing the complaint "could have been avoided if we'd had a discussion. I would have preferred it."
>
> They had a meeting with Steve Kelly and Larry Archbold about the time they gave the complaint to the FAC and Eric said "We told Chuck we would withdraw the FAC document if we succeeded in our meeting." They had 7-8 goals in the meeting but "Steve Kelly slammed the door" on them. Steve and Eric got into a discussion about that meeting. Steve remembered it differently; he remembered being responsive and asked what issues he'd "slammed the door on." Eric: the pay scales according to the difficulty of the work. Steve: the voice instructors specifically wanted those. But we told you we would change them [and they did]. Eric: chamber music. Steve: Larry and I did not run chamber music, but the department did issue more specific guidelines soon thereafter.
>
> At this point Eric harkened back to the June 1, 1995, meeting when adjunct and regular faculty discussed issues from the adjunct faculty questionnaire. He said "we felt those were received harshly." He guessed that's when they "started down that road. We assumed if we said black, we'd hear white" from the regular faculty. "If only the AFCC people had answered our letters…" Then he said, "But at this point I'd like to take the fuse out of the bomb. There"ve been mistakes on both sides . . . if there are sides.

The significance of that exchange is that Kodner did explain, in front of McKinsey, some of the assertions in the memorandum to the FAC which, at least, appear to underlie some of her continued complaints about them, made in her September 9 letter to Diekman.

Kodner testified that, during the September 6 meeting, McKinsey had complained about Diekman's "vulgar and disrespectful" conduct the preceding day. In response to that complaint, he told McKinsey that he had known Diekman "for a very long time" and that "it was my feeling that Karl's comments should be framed in the light of where he was coming from. That he is a freelance musician," as had been Kelly early in the latter's career. Interestingly, McKinsey never explained why she had chosen, during a meeting with one adjunct faculty member, to complain about another adjunct faculty member. This was not the only meeting with a faculty member when she had chosen to do so.

Kodner testified that he had heard from Deichert that, during his late August meeting, McKinsey had raised subjects pertaining to Kodner. During his September 6 meeting with her, testified Kodner, he raised what Deichert had said and told McKinsey, "If you have a bone to pick with me, I would appreciate it if you would discuss it with me personally and not with Mr. Deichert or anyone else on the faculty." There is no evidence that McKinsey had disputed, when confronted by Kodner, having talked about Kodner with Deichert. So far as his accusation to her is concerned, McKinsey remained silent.

One other exchange during that meeting should not escape notice. Kodner testified, without contradiction, that he had complained about another faculty membercross-examination appears to disclose that it had been Rodmaninitiating "a slanderous rumor . . . that I was presumably blackballing faculty who are performing musicians into voting the way that TAFC wanted them to[,] holding work in the Twin Cities over their head [sic]." According to Kodner, "Right away she assured me——she started assuring me that there was never any intention——she was telling me that she was sure that whoever had made this statement never had any intention of slandering me or saying anything."

There is no evidence concerning the basis on which McKinsey could have extended such an assurance to Kodner. Beyond that, while Respondent does not deny that spreading such a rumor would not be acceptable or professional behavior toward a colleague, there is no evidence that Kodner ever was asked for more detail as to what he knew about the rumor and its source. Nor was he asked to reduce to written form his account about the rumor. Moreover, so far as the record discloses, Kelly never made any effort to investigate what was being said about Kodner. All of which, of course, contrasts directly with Respondent's approach when advised about Diekman's statements concerning Valdivia and, for that matter, its music department.

II. DISCUSSION

The recitation of evidence set forth in sections I,B through L., supra, illustrates the conclusion stated in section I,A, supra, that the principal witnesses for both sides did not always testify with complete candor. Indeed, the record is left with an unflattering view of those witnesses. Still, formal proceedings under the Act, as in all judicial and quasi-judicial proceedings, do not present opportunities for indulging in personal feelings by "reward[ing] the good [person] and … punish[ing] the bad [person] because of their respective characters despite what the evidence in the case shows actually happened." Cal. Law Revision Comm"n, Rep., Rec. & Studies, 615 (1964), quoted with approval in Advisory Committee's Note to Fed.R.Evid. Rule 404(a). 56 F.R.D. 183, 219. Instead, the only aspect of their characters which is significant here is that pertaining to their veracity.

A. Activity by Diekman Protected by the Act

Usually, evidence showing that an alleged discriminatee had supported, and had acted on behalf of, a statutory labor organization suffices to satisfy the analytical factor of activity protected by Section 7 of the Act. But, there are unusual aspects to some of the activity in which Diekman and other adjunct music faculty had engaged from the spring of 1995 until the summer of 1996.

TAFC is admitted to have been a statutory labor organization. No one appears to dispute the unalleged fact that Musicians Union also is a statutory labor organization. Even if the ad hoc committee did not rise to that status, statutory protection extends to employees acting in conjunction with it, since the protection of Section 7 extends to employees whenever they "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]" As described in section I,B, supra, the ad hoc committee existed to ascertain the feelings of adjunct music faculty concerning their employment terms and conditions and, also, to determine whether that faculty desired separate representation. As a general proposition, even informal groups of employees concerned with such objectives qualify for protection by the Act. *NLRB v. Washington Aluminum Co.,* supra.

There are two unusual aspects with Diekman's and other adjunct music faculty's activities in connection with the ad hoc committee and with TAFC. In addition, there is an unusual aspect in connection with Diekman's activities on behalf of Musicians Union.

As to the latter, Valdivia testified that, during a telephone conversation on January 2, 1996, Diekman had demanded that Valdivia disclose the rates at which adjunct faculty would be compensated for performing during the Kohn festival. In light of Diekman's own subsequent remarks in his correspondence, as described in Section I.H., *supra*, there can be no doubt that Valdivia testified truthfully about that demand. That correspondence, moreover, leaves no doubt that Diekman had become belligerent when denied that information by Valdivia. As to those events, two aspects are significant in evaluating the extent of Diekman's protection under the Act.

First, he based his demand on Musicians Union's territorial jurisdiction over the geographic area in which Respondent is located and the levels of compensation which Musicians Union had established for performing in that area. However, even if some of Respondent's adjunct music faculty were members of Musicians Union, as pointed out in section I,H, supra, it was not the statutory representative of Respondent's adjunct music faculty and had no statutory right to production of the pay information demanded by Diekman.

Nevertheless, Diekman's purpose for requesting that information was not an illegal nor illegitimate one. He was seeking to ascertain whether or not those pay rates would comply with the area standard, in this instance as set by Musicians Union. The Supreme Court has pointed out "the dangers of inadequate wages to the economy and the standard of living of the populace." *DeBartolo Corp. v. Florida Gulf Coast Building. & Construction. Trades Council*, 485 U.S. 568, 576 (1988). Even though neither Musicians Union, nor Diekman, acting on its behalf, had a statutory right to that information, consequently, there was nothing illegal or illegitimate about action taken to ascertain if Respondent intended to comply with the area standard. That demand left Respondent with a choice: it could turn over the information or, as it did, refuse to disclose it. However, regardless of the choice made by Respondent, it cannot be said that Diekman's demand for the information had been so antithetical to the Act's objectives that, standing alone, his demand served to deprive him of the Act's protection for having made it.

The second significant aspect of Diekman's demand is perhaps more subtle, but is more important in the circumstances presented here. Following Valdivia's refusal to provide the information, Valdivia began encountering problems with the clarinet section of Respondent's orchestra. Moreover, it had been after Valdivia's refusal to comply with Diekman's demand that, as described in section I,H, supra, the latter had made his remarks to Bryce which appear to threaten action to prevent Valdivia from achieving tenure. Of course, had Diekman set out to retaliate against Valdivia for refusing to produce information to which neither Musicians Union or Diekman had any statutory right, then Diekman would have been on a course which deprived him of the Act's protection. Yet, in the circumstances presented here, that cannot be concluded to have occurred.

As his own subsequent written words reveal, obviously Diekman had been angry that Valdivia had refused to turn over the pay information. At best, however, that January 2 refusal had been but another of an ongoing series of incidents which demonstrated Diekman's dislike of Valdivia since the latter had arrived at Respondent during the Fall of 1994. For example, even before the telephone conversation, Diekman had told Rodman that he (Diekman) intended "to get Valdivia."

True, it had been after the January 2 telephone conversation when Valdivia began encountering problems with the orchestra's clarinet section. But, Respondent has adduced no evidence connecting whatever disturbances were occurring with Valdivia's refusal to reveal the pay information demanded by Diekman. Certainly the record contains evidence that at least some students, independently of Diekman, had become disenchanted with Valdivia. That is shown both by the complaints voiced in Kodner's memorandum to Kelly of January 22, 1996, described in section I,G, supra, and, as well, by one student's prolonged complaints about Valdivia in her written communication to Kelly dated June 1, 1996, as discussed in that same section.

Beyond that, at no point has Respondent connected its concern with Diekman's and Valdivia's poor relationship to the latter's refusal to disclose information to the former. To the contrary, as reviewed in section I,H, supra, Respondent appeared to be unconcerned with the sources of the poor relationship between those two music faculty members. At no point has Respondent contended that its refusal to extend a 1996–1997 contract to Diekman had been motivated by his reaction to Valdivia's refusal to disclose information demanded by Diekman. Moreover, at no point has Respondent shown that it believed that Diekman had set out to retaliate against Valdivia because of the January 2 conversation. As a result, though it would be unprotected under the Act for Diekman to have retaliated against Valdivia for refusing to disclose information to which Diekman had no statutory entitlement, Diekman's reaction to that refusal has not been shown to have been directly or indirectly a component of Respondent's motivation for refusing to continue employing him and has not been shown to have been a component of Respondent's perception of Diekman's dislike for Valdivia. Yet, as pointed out in section I,.D, supra,

it is Respondent's burden to establish evidence concerning its own motivation.

In sum, there is no basis in the evidence for concluding that any aspect of Diekman's activities in connection with Musicians Union had served, given Respondent's asserted motivations for having not extended another contract to him, to deprive him of the Act's protection with regard to the protected activity in which he had engaged. But, as pointed out above, two aspects of the ad hoc committee's and TAFC's activities require somewhat more extended consideration.

As to the first, both the ad hoc committee and TAFC raised for discussion, and made recommendations concerning, subjects, described in sections I,B and E, supra, which might be said to have exceeded the employer-employee relationship—to have wandered into the areas of management discretion and of Respondent's relationship with its students. Examples of such subjects are required lesson-hours for music majors, requiring lessons for students to participate in ensembles, student recruitment, including adjunct music faculty in the selection process for ensemble directors and adjunct faculty to be hired, including adjunct faculty in ensemble auditions and ensemble student-seating, and encouraging private applied music study and student participation in chamber music groups and performing ensembles.

Even so, it cannot be said that subjects such as those listed above are totally unrelated to the employment conditions of Respondent's adjunct music faculty. After all, the more lessons that students take, or are required to take, the more secure are the jobs of adjunct music faculty. The extent of students' music experience and skill has a direct impact on the types of lessons that can be given. And, of course, it is ensemble directors who determine the music which will be performed and, concomitantly, the types of coaching assignments which will be available.

To be sure, the foregoing subjects may not become mandatory bargaining subject, within the meaning of Section 8(d) of the Act, merely because they have some affects on employment conditions of adjunct music faculty. Still, they need not necessarily be mandatory subjects for protection to be extended to employees who raise them for discussion and make recommendations concerning them. "It is true, of course, that some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567–568 (1978). Nevertheless, even such "less immediate relationship" subjects are encompassed by the protection of Section 7 of the Act.

As pointed out in section I,A, supra, "employees who attempt to persuade their employer to modify or reverse a management decision are engaged in conduct which is protected by Section 7 of the Act," *Alumina Ceramics, Inc*., supra, and there seems no reason to apply a different conclusion to employee attempts to persuade employers to make a management decision which changes existing policy. It should not be overlooked, moreover, that TAFC's recommendations to the FAC had been made as part of an effort to deal with Respondent through its internal disputes resolution process. Effectively, under the Act that is one means of engaging in collective bargaining and "parties are free to bargain about any legal subject." *NLRB v. First National Maintenance,* supra. If those subjects were not ones about which Respondent wanted to deal with TAFC, or if it was unwilling to acquiesce in TAFC's suggestions, it merely needed to say so.

No different conclusion is warranted by the fact that some of those subjects seem rooted more in the educational institution-student relationship than in the employer-employee relationship. In the area of health care it has been held as to some subjects that patient welfare and employment conditions can be "inextricably intertwined." *Misericordia Hospital Medical Center v. NLRB*, 623 F.2d 808, 813 (2d Cir. 1980); *NLRB v. Parr Lance Ambulance Service*, 723 F.2d 575 (7th Cir. 1982). No reason exists in logic for not applying that same rationale in the field of higher private education, especially given the "concept of collegiality" which is ordinarily followed in institutions of higher learning and the degree to which such institutions "must rely on their faculties to participate in the making and implementation of their policies." *NLRB v. Yeshiva University*, 444 U.S. 672, 680, 689 (1980).

In the final analysis, it must not be overlooked that the above-listed subjects had been but some of the subjects raised by the ad hoc committee and TAFC. As set forth in sections I,B and E, supra, they were raised in conjunction with other subjects—pay and other compensation matters, facilities, negotiations of annual contracts, free election of adjunct faculty representatives and procedures for adjunct faculty to present grievances, for example—which lie at the heart of the statutory phrase "terms and conditions of employment." To that extent, accordingly, the ad hoc committee's and TAFC's communications constituted "mixed-messages."

Mixed-message communications with employers have been held entitled to the Act's protection, so long as there is no evidence that the disputes about employment conditions identified by them were not genuine and significant concerns of employees. See, e.g., *Fun Striders, Inc. v. NLRB*, 686 F.2d 659 (9th Cir. 1982). Here, there is no evidence that any of the adjunct faculty concerns identified by the ad hoc committee during the spring of 1995, nor in TAFC's memorandum to the FAC, did not pertain to genuine and significant terms of at least some adjunct music faculty. Most particularly, there is no evidence that any of them did not pertain to what Diekman genuinely viewed as significant ones. In consequence, there is no basis for concluding other than that all of those subjects were "part of and related to the ongoing labor dispute which became manifest" to Respondent through the ad hoc committee's and TAFC's communications to it. *Mitchell Manuals, Inc.*, 280 NLRB 230, 231 (1986).

The second aspect of those communications arises as a result of the content and tenor of TAFC's memorandum submitted to the FAC. For McKinsey and Kelly that memorandum became a matter of significant concern, as discussed further in succeeding subsections. He recommended it as one basis for disciplining Diekman; she chose to include it as one area to be covered during her meeting to decide whether or not a contract would be extended to Diekman.

As set forth in her September 9 letter to Diekman, McKinsey complained specifically about that memorandum's "many overstatements and misstatements concerning the music department and its leadership that were inflammatory and unsupported by evidence," and which "were extremely serious[.]" However, at no stage–not in his disciplinary recommendation, not during their September 5 meeting with Diekman, not in her September 9 letter of farewell—did either Kelly or McKinsey point with any degree of particularity to the specific statements in that memorandum which were covered by those various characterizations. Such a lack of particularity is significant. For, as con-

cluded in subsection C, infra, it was a principal basis for the action taken against Diekman. By failing to specify exactly which statements were covered by those characterizations, Respondent has failed to satisfy its burden of supplying particularized evidence concerning its own motivation, *Inland Steel Co.,* supra, leaving it to the trier of fact and reviewer to supply a particularized explanation for it—a process in which the Board does not permit its administrative law judges to engage. *Super Tire Stores,* supra.

Beyond that, there is no evidence that TAFC had disseminated its memorandum to the FAC to students or other members of the public. Cf., *NLRB v. Local 1229 IBEW (Jefferson Standard)*, 346 U.S. 464 (1953). Rather, it was a document submitted only to a body involved, inter alia, in disputes resolution between Respondent and its faculty. There is no evidence that adjunct faculty were excluded from that process. The importance of that point must not be overlooked.

TAFC is an admitted labor organization. It was recognized by Kelly on January 30, as described in section I,D, supra. In evaluating the relationship between employees and recognized employee representatives, the Board is not empowered to evaluate the substance of proposals, nor the wisdom of how parties choose to advance them. See, e.g., *NLRB v. American Insurance Co.*, 343 U.S. 395 (1952); *NLRB v. Insurance Agents' Union*, 361 U.S. 477 (1960); *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965). As a result, choices of subjects advanced for discussion and the means chosen for advancing them are not, at least within rather wide limits, matters on which the Board is allowed to sit in judgment. For example, that TAFC's memorandum to the FAC may have seemed duplicitous to Respondent, in view of the seemingly successful meeting of Kelly with TAFC, as described in Section I,D, supra, is not a value judgment which the Act allows the Board to make in the context of a case involving protection of activity under the Section 7.

Respondent has never challenged the general propriety of faculty bringing their complaints to the FAC. Moreover, FAC-member Carlin acknowledged that he had suggested that Diekman and Kodner bring their problems with the music department to the FAC, as pointed out in section I,E, supra. Indeed, the FAC was responsive to TAFC's memorandum. As described in section I,E, it met with TAFC's representatives and made suggestions concerning resolution of their disputes. To be sure, Respondent chose to label those suggestions as a "DRAFT", without explaining what it had been a draft of, and its officials have now chosen to question whether the FAC truly had any authority to intervene in the dispute. But, that was not the position taken by Kelly in his handwritten memorandum to McKinsey dated March 8, 1996, as described in section I,.E. At that time, Kelly complained not about the FAC's ability to become involved in the dispute, but only about the FAC's probable willingness "to waste its and my valuable time with a response."

The fact that TAFC's memorandum to the FAC was encompassed by the overall bargaining process is important for another reason. The Supreme Court has set broad standards of propriety for both the content and the tenor of communications made during that process. "Labor disputes are ordinarily heated affairs," it has pointed out, but "the enactment of [Section] 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management." (Footnote omitted.) *Linn v. United Plant Guard Workers*, 383 U.S. 53, 58, 62 (1966). "Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language," (citation omitted), Id. at 58, and such "freewheeling use of the written and spoken word … has been expressly fostered by Congress and approved by the NLRB." *National Association of Letter Carriers v. Austin*, 418 U.S. 264, 272 (1974).

To be sure, such protection is not completely without limitation: "the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." Ibid at 63. "A 'reckless disregard' for the truth, however, requires more than a departure from reasonably prudent conduct," but rather 'there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of … probably falsity.'" *Garrison v. Louisiana*, 379 U.S. at 74." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989). And such a "high degree of awareness" is not established merely by "exaggerated rhetoric", by "overenthusiastic use of rhetoric or the innocent mistake of fact", or by "lusty and imaginative expression." *Letter Carriers v. Austin*, supra, 418 U.S. at 277, 286.

Even making an effort to divine to what portions of TAFC's memorandum to the FAC were regarded by Respondent as "overstatements and misstatements," et cetera, which Respondent has not bothered to specify, it is difficult to conclude that there had been any which were so significant that, in the context of the overall bargaining process, it could be said that they deprived the entire memorandum of the Act's protection. A mere handful of inaccuracies or overstatements in a 28-page document surely does not do so. At best, they constitute no more than embellishment or reckless language which, as pointed out above, does not serve to remove protection of the Act.

More troubling, perhaps, are charges such as the ones that the adjunct music faculty had been "misled, threatened, lied to, lied about and scolded," and had been subjected to "scare tactics" and discrimination, as well as the assertion about being employed by an institution whose music department is regarded as an "embarrassment." Still, it should not be overlooked that the memorandum was not one which was distributed to students and other members of the public. It was submitted to the FAC, a disputes resolution body, as part of an effort to resolve disputes between the adjunct music faculty, through TAFC, and Respondent.

Furthermore, there was some basis for many of the terms utilized in that memorandum. As described in section I,B, supra, during the June 1, 1995 meeting, it is undisputed that the ad hoc committee had been lectured and, given that lecture, it is arguable that they had been "scolded." Moreover, after having been told during that meeting about the ad hoc committee's planned election for the Fall, and having endorsed the idea of doing so, Kelly put out a memorandum, dated October 26, 1995, which asserted that that election had been conducted "unbeknownst to the Department[.]" Given that June 1 background, there is an objective basis for Diekman and other adjunct music faculty to believe that they had been "lied about" in Kelly's October memorandum and, further, that Kelly's June "good idea" remark had "misled" them and constituted having been "lied to" on June 1 with regard to that "good idea."

In sum, the language in TAFC's memorandum to the FAC may at points have been "exaggerated", "overenthusiastic", "lusty and imaginative", and even blunt and reckless. But, the

record does not support a conclusion that, even given some misstatements, TAFC's supporters had chosen their language with "a high degree of awareness of . . . probably falsity." *Garrison v. Louisiana*, supra. Furthermore, even if that could be said of a few such statements in the memorandum, there has been no showing that such isolated overstatements were so serious, particularly when made in the course of disputes resolution, that the entire memorandum should be removed from the protection of the Act.

That is especially so in the context presented here. TAFC is a statutory labor organization. But, it is not one established on a national or statewide basis. Nor is it affiliated with any such established organization. In reality, it is an organization composed only of a handful of employees who, in the final analysis, have been trying to represent themselves and who "had to speak for themselves as best they could." *NLRB v. Washington Aluminum Co.,* supra, 370 U.S. at 14. In such circumstances, it hardly promotes the purposes of the Act to strip those employees of the Act's protection merely because of a few imprudent statements in the course of trying to deal with their employer.

Therefore, a preponderance of the credible evidence warrants the conclusion that, at all material times, the ad hoc committee and, then, TAFC had been engaged in activities encompassed by the Act. It follows that, while no doubt he has displayed truculence and, even, belligerence, Diekman's activities in connection with the ad hoc committee and TAFC were protected by Section 7 of the Act.

B. Knowledge of and Animus toward Diekman's Protected Activities

Respondent does not contest that it had knowledge of Diekman's activities on behalf of, and in conjunction with, the ad hoc committee, TAFC and Musicians Union. Obviously, given the evidence set forth in sections I,B through E, supra, it hardly is in a position to do so. A quite different situation, however, is presented concerning the analytical element of animus.

Respondent denies that it harbors hostility toward unions and toward the collective-bargaining concept. In fact, there is no evidence that Respondent is so virulently antiunion. Still, a finding of animus does not require evidence that a particular respondent is virulently antiunion or is adamantly opposed altogether to unionism of its employees. After all, "a piece of fruit may be bruised without being rotten to the core." *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 880 (1984).

Instead, animus can be found to exist in more limited situations where an employer's hostility is confined to a particular representative or, even, where it is limited to particular forms of union activity by its employees. See, e.g., *John Klann Moving & Trucking v. NLRB*, 411 F.2d 261, 262-263 (6th Cir. 1969), cert. denied 396 U.S. 833 (1969), and, more recently, *W. F. Bolin Co. v. NLRB*, 70F.3d 863 (6th Cir. 1995).

Animus, of course, is an element which can be inferred. See, *Handicabs, Inc.*, 318 NLRB 890, 897 (1995), enfd. 95 F.3d 681 (8th Cir. 1996), pending disposition on petition for certiorari. However, the General Counsel argues that there is direct evidence of Respondent's animus: Diekman's and Kodner's accounts of Kelly's threat concerning discontinuance of Respondent's applied music program should the adjunct music faculty become unionized, as described in section I,B, supra. Of course, that purported statement had been made on June 1, 1995, well before commencement of the 6-month statutory period arising from the filing of the unfair labor practice charge underlying the instant proceeding, on January 16, 1997. Even so, "conduct occurring prior to the Section 10(b) period may be used to shed light on the Respondent's motivation even though the Board may not give it independent and controlling weight." (Citation omitted.) *Monongahela Power Co.*, 324 NLRB 214 (1997). However, consistent with what has been stated in section I,A, supra, I do not credit the testimony that so outright a threat had been made by Kelly.

Instead, Rodman's testimony, supported in part by that of Valdivia, seemed the most reliable account of Kelly's words on June 1. That account shows that Kelly had done no more than express concern about student willingness to continue signing up for lessons should Respondent have to raise lesson-costs as a result of having to deal with a unionized adjunct music faculty. Obviously, students are third parties whose choices Respondent could not dictate. True, it could impose lesson requirements, as would be recommended by TAFC, but such requirements at increased costs could lead students to enroll elsewhere. In any event, the evidence supports only a conclusion that, at best, Kelly had made a prediction, not a threat.

Nonetheless, Kelly's remarks on June 1, as described by Rodman, do reveal that he was concerned about music department costs and the possible affects on them should the adjunct music faculty become unionized. Moreover, department costs also were mentioned by Kelly in his memorandum to Diekman and Kodner, responding to their "wish list," as described in section I,.D, supra. In that regard, it is interesting to note that Archbold had seemed initially receptive to the idea of adjunct music faculty becoming represented, as shown by his letter of May 3, 1995, discussed in section I,B, supra. But that letter had been sent before the ad hoc committee had reported the results of its survey. After receiving those results, reflecting asserted concerns by some adjunct faculty about such subjects as compensation, travel time pay and negotiation of annual contracts' terms, Respondent's attitude underwent an abrupt change toward the concept of separate representation of adjunct music faculty.

Not only did Kelly express concern about costs during the June 1 meeting, but during that meeting, it is uncontradicted, the ad hoc committee was subjected to a lecture about things remaining the way they always had been. The significance of that lecture may not have been fully apparent on June 1. However, at the beginning of the following academic year its significance was revealed. Over the summer, Archbold and Kelly had formulated improvements in some adjunct music faculty employment conditions and, also, had formed an organization—AFCC—which was to become the "only . . . Departmental committee for adjunct faculty concerns[.]" In short, Respondent had conducted a preemptive attack on the ad hoc committee's plan to conduct an election on behalf of a representative of only adjunct music faculty. Not only would AFCC become Respondent's chosen representative of adjunct music faculty, but that faculty would be represented in an overall group with tenure and tenure-track faculty, thereby diluting the ability of adjunct faculty to have their separate interests represented.

When an employer creates an organization to serve as the representative of employees who are expressing dissatisfaction with their employment terms and conditions, and imposes that organization as the representative of those employees, that employer violates the Act. "Congress' goal in enacting Section

8(a)(2) was to preserve for employees the right to choose their bargaining representative free of employer interference or coercion." (Footnote omitted.) *Auciello Iron Works*, 317 NLRB 364, 371 (1995).

Such conduct is but exacerbated whenever the employer preempts its employees' efforts to choose a particular representative by creating a different one of that employer's own choosing to represent those employees and by insisting that those employees accept representation by it. Such an employer deprives employees of their statutorily guaranteed "complete and unfettered freedom of choice," *NLRB v. Link-Belt Co.*, 311 U.S. 584, 588 (1941), to select their own representative, instead of being represented by one selected by their employer.

Kelly advanced no explanation for having decided abruptly during the summer of 1995 to create AFCC and to designate it as the representative of adjunct music faculty. Nor did he explain Respondent's reasons for having also abruptly formulated improved benefits for adjunct music faculty and for having announced them at the same time as AFCC's creation was announced. Given the timing of those actions, and given the absence of any legitimate explanation for them, it is a fair inference that Respondent had formulated and implemented those benefit improvements and had created AFCC as a means for eliminating separate representation of adjunct music faculty and, also, for eliminating their desire for separate representation.

Of course, as described in section I,D, supra, Respondent eventually did recognize and meet with TAFC. However, the honeymoon between them did not last long. Hostility again surfaced following TAFC's memorandum to the FAC. In his handwritten memorandum to McKinsey, described in section I,E, supra, Kelly complained that the memorandum would probably lead to a "waste of [the FAC's] and my valuable time with a response."

Kelly's hostility did not abate over time. As set forth in section I,I, supra, he advanced the memorandum to the FAC as one reason for recommending that Deichert, Diekman and Kodner be disciplined–indeed, in Deichert's case, it was one of but two reasons advanced for discipline. McKinsey adopted that recommendation to the extent that she included the memorandum to FAC as one subject which she discussed with those three adjunct faculty members, during individual meetings with them, prior to deciding whether or not to continue employing the three of them. And, of course, the memorandum was a prominent feature of her September 9 letter to Diekman, informing him that he would not be receiving a contract for the 1996–1997 academic year.

In connection with that September 9 letter, it should not escape notice that three days earlier, during his individual meeting with McKinsey and Kelly, Kodner had defended the accuracy of the statements in TAFC's memorandum to the FAC, as described in section I,L, supra. Nonetheless, while she apparently accepted Kodner's explanation so far as he was concerned, McKinsey continued to rely on the memorandum's asserted "overstatements and misstatements" as one reason for Respondent's displeasure with Diekman, as expressed in her September 9 letter to him.

As concluded in subsection A supra, TAFC's memorandum to the FAC constituted activity protected by Section 7 of the Act. Respondent's continued almost fixation with it—as a reason for discipline, as a reason for meeting with TAFC's elected representatives to determine if their employment with Respondent would continue, and as a reason for not continuing to employ Diekman—evidences animus toward Diekman, inter alia, for activity protected by the Act. Given the preceding discussion of Respondent's attitude toward TAFC, the ad hoc committee and the concept of separate representation of adjunct music faculty, once it became clear from the survey what such separate representation might involve, I conclude that a preponderance of the credible evidence establishes that Respondent harbored animus toward Diekman for his statutorily protected activity.

C. Motivation for Discontinuing Diekman's Employment with Respondent

A number of objective factors serve to establish that, in not extending a 1996–1997 contract to Diekman, Respondent had acted on its animus toward his support for separate representation of adjunct music faculty and, more especially, toward his conduct in connection with TAFC's statutorily protected memorandum which had been sent to the FAC.

First, Kelly's July 17, 1996 disciplinary recommendations were made only for those adjunct music faculty who were TAFC's leading proponents and, also, for the three adjunct faculty who had submitted that memorandum on behalf of TAFC which would so perturb Kelly and McKinsey. The fact that Respondent singled out TAFC's three foremost proponents for disciplinary recommendations, and for individual meetings with Respondent's dean of the college as a condition to continuing their employment, are facts which inherently "give rise to an inference of violative discrimination." *NLRB v. First National Bank of Pueblo*, 623 F.2d 686, 692 (10th Cir. 1980). See also *Concepts & Designs*, 318 NLRB 948, 952–953 (1995), enfd. 101F.3d 243 (8th Cir. 1996), and cases cited therein.

Second, individual meetings with adjunct faculty, conducted as a condition to determining whether or not to extend annual contracts, were unprecedented. So far as the evidence discloses, such meetings had never been conducted before the summer of 1996.

Third, as reviewed in subsection B above, for over a year before those individual meetings, Kelly had expressed antagonism toward the concept of separate representation of adjunct music faculty. In fact, he had formed AFCC as a replacement representative—as the "only . . . Departmental committee for adjunct faculty concerns"—for one then being formed only for adjunct music faculty.

Kelly's animus cannot be minimized by the fact that it is McKinsey who possesses ultimate authority to discipline faculty, as mentioned in section I,A, supra. For, he is the one who made the disciplinary recommendations upon which she then took action, by meeting individually with TAFC's three proponents. In addition, he admitted—though McKinsey omitted mention of it—that he had conferred with McKinsey before she had made the ultimate decision not to extend another contract to Diekman. In such circumstances, Kelly's animus can be attributed to McKinsey, even if she had never displayed animus. See *Efficient Medical Transport*, 324 NLRB 553 fn. 1 (1997), and cases cited therein.

There is, moreover, evidence that McKinsey had harbored animus toward at least some of TAFC's statutorily protected activities. For, she specified as one area of concern, during her meetings with each of the three TAFC-supporters, the memorandum which had been sent to the FAC by TAFC on March 5, 1996. True, she only had expressed concern about some un-

specified portions of that memorandum. Yet, as concluded in subsection A supra, there is nothing in that memorandum which removes it from the protection of the Act. Consequently, by enumerating that memorandum as an area of concern, McKinsey demonstrated her animus toward statutorily protected activity by Diekman and by other TAFC supporters.

Fourth, during July through September 1996, Kelly and McKinsey also voiced antagonism toward TAFC's—and, accordingly, Deichert's, Diekman's, and Kodner's—inclusion of Hamilton's name on TAFC's letter to Kelly of October 20, 1995. Yet, that had been a letter sent by a statutory labor organization. Under the Act, no employer can question or retaliate against employees for internal union activity. Such conduct constitutes an invasion of a labor organization's internal affairs. True, Hamilton possesses a statutory right to refrain from engaging in union activity. Yet, his statutory right confers no concomitant right upon Respondent. "to allow employers to rely on employees' rights," as a launching pad for disciplining, or threatening to discipline, other employees, "is inimical to" the Act's "underlying purpose of … industrial peace." *Brooks v. NLRB*, 348 U.S. 96, 103 (1954).

In that connection, it should not be overlooked that, having claimed to have received an oral report from Hamilton during 1995, about the asserted lack of authorization to include his name on the letter, there is no evidence that Kelly took any action whatsoever at that time to at least investigate Hamilton's assertion. If including a faculty member's name without authorization constitutes such "highly questionable behavior," as McKinsey later claimed in her letter to Diekman of September 9, then seemingly some action would have been taken to at least investigate Hamilton's assertion in the more immediate wake of his having made it.

In addition, by September 9 McKinsey was on notice that Hamilton's assertion was disputed. In her letter of that date to Diekman she acknowledged that Diekman had disputed Hamilton's assertion. As described in section I,L, supra, Kodner also disputed that assertion, during his meeting with McKinsey and Kelly on September 6, 1996. Even so, McKinsey continued to rigidly rely upon Hamilton's assertion as one area of concern when she notified Diekman that he would not be receiving a 1996–1997 contract. Such conduct tends to show that an employer is more disposed toward piling on reasons to justify its allegedly unlawful action, than toward reciting its true reason for such action. In other words, such conduct is a somewhat strong objective indicator of pretext.

Fifth, whenever an employer places an employee in the position of being "unable to explain his version of an incident" for which that employer is taking action against that employee, such conduct "is a further indicator of unlawful motivation[.]" *Handicabs, Inc.,* supra, 318 NLRB at 897, and cases cited therein. See also, the circuit court''s like enumeration of that indicator in *Handicabs, Inc. v. NLRB*, supra, 95 F.3d at 685.

As set forth in section I,L, supra, Diekman was told, during his September 5 meeting with McKinsey and Kelly, that he had made comments to two faculty members about Valdivia and, also, had complained to two students about "Valdivia and about the department." But, so far as the evidence reveals, neither of the two faculty members had been identified for Diekman. Further, Respondent concedes that the students were not identified to Diekman. Moreover, so far as the record discloses, the nature of the reports to Respondent by the two faculty members and by the two students was never described to Diekman. As a result, he was left unable to defend himself against those charges. In those respects, therefore, Respondent's conduct tends to show that it "was not truly interested in whether misconduct had actually occurred." Ibid 318 NLRB at 897, and cases cited therein. Rather, Respondent's approach shows that it was more concerned with reciting facially legitimate reasons, than for ascertaining whether there truly had been support for those purported reasons.

A sixth objective factor also arises in connection with the immediately foregoing one. So far as the record shows, Respondent never had investigated any of those charges made against Diekman by the two faculty members—Rodman and Bryce—nor the ones made by the two students, as described in sections I,H and G, supra, respectively. That is, prior to September 5, 1996, no official of Respondent ever had reported to Diekman what was being said about him and offered Diekman an opportunity to refute or explain what was being said about him.

In other circumstances, it might be argued that an employee was being called upon to refute or explain such charges when they were mentioned to him during a meeting such as that conducted by McKinsey on September 5. Yet, a review of the accounts of that meeting, as set forth in section I,L, *supra*, reveals that no explanation was actually being sought from Diekman during it with respect to those faculty and student reports. As pointed out above, his accusers were never identified, nor was he informed of what had been said by them. Beyond that, McKinsey never invited Diekman to explain what he might have said to faculty members and students, detrimental to Valdivia or Respondent. Rather, she simply accused him of having engaged in misconduct as reported by the two faculty members and two students. So far as her attitude was concerned, McKinsey had already concluded, by the time of the September 5 meeting, that Diekman had done whatever had been reported.

Seventh, some of the misconduct for which McKinsey criticized Diekman, and for which Kelly earlier recommended that he be disciplined, was somewhat stale by September 5. Diekman's remark to Rodman had been made near the end of the preceding year. The incident involving Hamilton had occurred almost a month earlier. And, as set forth in section I,G, supra, one student's prompted assertions of adverse remarks about the music department had occurred almost 4 years before Kelly's disciplinary recommendations. Resort to such relatively stale incidents, as a basis for discipline, is a further indication of an effort to construct a legitimate defense for an employer's action—as an effort to create a pretext sufficient to cover up its actual motivation—and, in turn, to infer that the true reason being concealed is an unlawful one.

Finally, in this regard, it should not escape notice that, notwithstanding the actual dates of inclusion of Hamilton's name on TAFC's letter to Kelly, and of the incidents reported by Rodman and Bryce, as well as by the two students, none of those incidents were documented until after TAFC had submitted its memorandum to the FAC. To be sure, there is some logic to the timing of the students' reports: at the end of academic year, as they were graduating. Still, it should be noted that Kelly's memorandum about one student misstates her report to him, when compared to Kelly's testimony as to what that student actually had said to him about Diekman. For, as set forth in section I,G, supra, his "5/27/96" memorandum states that the student "dropped lessons with Karl [over] his

complaints to her about the department," when, in fact, he testified that she had reported dropping lessons because of the quality of Diekman's instruction.

Even given the logic of the timing of those two students' statements to Kelly, the fact remains that within an approximately 50-day period, following submission of TAFC's memorandum to the TAFC, all of the documentation about Diekman was collected by Respondent. One pertained to a situation almost four years old by the end of May, 1996. Two pertained to incidents during 1995. Bryce's written account was not prepared until over a month had passed since the conversations reported in it, one of which described an effort to procure Bryce's signature on a Musicians Union card. As to that approximately month-and-change hiatus, Bryce and Kelly advanced conflicting explanations, as described in Section I.I., *supra*. The suspiciousness created by the timing of preparation of those five documents is heightened by the absence of any evidence of prior similar documentation pertaining to Diekman during the 13 years that he had worked for Respondent.

To be sure, any respondent contemplating disciplinary action has a right to document its reasons, to fortify its position in a subsequent legal proceeding challenging that discipline. See, e.g., *Mac Tools, Inc.*, 271 NLRB 254, 255 (1984). But, that was not an assertion made by Respondent—it does not contend that the documents had been generated in anticipation of discipline of Diekman and of the possibility of his effort seek redress for that discipline. As pointed out already, I am not at liberty to construct a defense which Respondent has not chosen to advance. Accordingly, the record is left with a set of documents, adverse to Diekman, which were prepared over a relatively short period after submission of the memorandum to the FAC and which are now advanced in defense of Respondent's motivation, even though no similar such documents had been prepared about Diekman during his relatively prolonged employment by Respondent.

The totality of the foregoing factors establishes that Kelly had recommended discipline against the three TAFC-activists because of their support for separate representation of adjunct music faculty and, most particularly, because of their participation in TAFC's memorandum to the FAC. It further establishes that McKinsey had adopted Kelly's concern about the memorandum, at least, and chose to meet separately with Deichert, Diekman and Kodner, using the prospect of not receiving their 1996–1997 contracts as, in effect, a club to compel them to abandon or, at least, modify their activities on behalf of TAFC toward which Respondent was antagonistic. She succeeded in doing so with Deichert, who could only have agreed to expectations concerning TAFC's activities, given the reasons for Kelly's recommendation that he be disciplined, and with Kodner. When it appeared that Diekman was unwilling to do so, McKinsey, and seemingly also Kelly, decided to not extend a contract to him for the coming academic year.

Of course, that does not end analysis of the analytical element of motivation. As pointed out in section I,A, supra, even if the General Counsel shows that statutorily protected activity had motivated a respondent's allegedly unlawful action, that respondent still could prevail by establishing that "it would have taken the same action even in the absence of the employee's protected activity." *TNT Skypak, Inc.,* supra.

Trying to fit within that framework, Respondent argues that discipline would have been recommended against Diekman even if he had not participated in the October 1995 letter to Kelly and in the memorandum to the FAC and, further, that he would not have continued to be employed even if he had not engaged in those activities. Yet, the testimony on which it relies for those arguments is not credible, as discussed in section I,A. supra. Beyond that, several objective factors undermine any facial validity which its argument might otherwise possess.

First, the situation pertaining to Deichert virtually obliterates Respondent's argument that Kelly's disciplinary recommendation concerning Diekman, and McKinsey's meeting with him based upon that disciplinary recommendation, as well as the decision not to extend another contract to Diekman, had not been the product of Respondent's antagonism toward some of TAFC's activity and Diekman's conduct in connection with it. For, only that same TAFC-related activity had been the basis for Kelly's recommendation and for McKinsey's meeting with Deichert. So far as the evidence shows, had Deichert, like Diekman, not been willing to acquiesce in McKinsey's demands, Deichert also would not have received a contract for the 1996–1997 academic year. And that would have occurred solely because of Deickert's TAFC-related activities.

Second, as must be evident from the discussion above, even a cursory review of the other three areas enumerated by Respondent reveals the hallmarks of pretext. The were relatively stale: Rodman's report was based upon a November 1995 remark by Diekman, one student's prompted answer relates to almost 5-year-old events, and even the area involving Hamilton was over eight months old by July 17, 1996. For the most part, they were areas in which Diekman had been given no meaningful opportunity to respond and, in fact, were areas in which Respondent had done no more than accept assertions of impropriety without bothering to conduct any investigation whatsoever to ascertain if there was support for them. Respondent simply sat back collecting written documents after TAFC's memorandum to the FAC and, then, sprang those situations on Diekman in accusatory form, without bothering even to identify his accusers or describe specifically what they had said about him.

Related to that factor is the third one: comparison of Respondent's treatment of the only non-TAFC-related area enumerated for Kodner with the areas of complaints about Diekman arising from the latter's interaction with Valdivia and with students. As concluded in section I,H, supra, Diekman had made threats connected to Valdivia's tenure efforts to two faculty members: Rodman and Bryce. Yet, there is no evidence whatsoever that Diekman engaged in any conduct directed to students to implement those threats. Valdivia and even Respondent may have believed that clarinet section disturbances were attributable to Diekman. But, they presented no evidence to that effect nor, so far as the record discloses, even had bothered to investigate to determine whether Diekman had been the root of those disturbances. At least one student, as pointed out in section I,G, supra, had become so disenchanted with Valdivia that she chose to write a relatively lengthy communication to Kelly, expressing her dissatisfaction with Valdivia. Obviously, students have minds of their own. So, to the extent that Valdivia had encountered problems with students, there is no basis for inferring that Diekman had been the more likely cause of those disturbances, than that students had decided among themselves to create them. In fact, there is no particularized evidence of what Respondent's witnesses had meant by the asserted disturbances.

The only evidence of remarks by Diekman to a student critical of Respondent is the almost 4-year-old, by September of 1996, unparticularized affirmative answer to Kelly's question put to that student. Obviously, such criticism, assuming that Diekman truly had voiced it, could not have been about Valdivia. True, Diekman did tell another student about not being paid. Yet, there is no evidence that, in having said that, Diekman had done anything more than make a statement of fact. There is no evidence, nor did Respondent possess any during 1996, so far as the record shows, that Diekman had said that to the student as a criticism of Respondent or, for that matter, of Valdivia. A very different situation existed with respect to Kodner.

His memorandum to Kelly of January 22, 1996, described in section I,D, supra, revealed that he had been involved in more than two discussions with students about both Valdivia and Respondent's music department. As to the latter, he had participated in a discussion with two students about a coaching assignment made to Rodman. Though Kodner may not have said anything to inflame those students' criticism, his memorandum shows that he had listened to what they were saying long enough understand their criticism, to decide that their criticism had merit, and to make a recommendation based upon the criticism articulated by those two students. In other words, he did not simply refer those students Valdivia or Kelly, as he should have done under Respondent's policy concerning criticisms voiced by students.

Clearly, moreover, Kodner had become even more embroiled in two other students' complaints about Valdivia. For one student, Kodner rushed off to the Music Listening Library where he photocopied what he believed to be the correct means of transposition and, then, armed that student with the copies to show to Valdivia. In the instance of the other student, Kodner took the further step of contacting Valdivia and attempting to intervene with him on the student's behalf. There is no evidence that Diekman had ever made so intrusive an effort on behalf of any student.

None of those incidents had been remote by the summer of 1996, as had been the almost four-year-old incident to which one student referred, when questioned by Kelly, with regard to Diekman. Clearly, Respondent had knowledge of what Kodner had been doing; he had related his activities to Kelly in the memorandum of January 22, 1996. Yet, McKinsey accepted Kodner's denial of excessive involvement with more than one student – an obviously false denial, given the statements in Kodner's own memorandum—and, as described in section I,L, supra, moved on to the TAFC-related criticisms of Kodner.

The foregoing objective considerations in connection with Kodner, when compared to Respondent's evidence against Diekman, tend to undermine Respondent's assertions of true concern about Diekman's communications with students and about his conduct toward Valdivia. As to the latter, not only did Respondent fail to present any evidence of action by Diekman to undermine Valdivia's effort to achiever tenure, but Respondent took no action whatsoever during the Spring of 1996 either to confront Diekman about reports of such threats nor to ascertain whether Diekman actually had been engaging students in an effort to undermine Valdivia. If Respondent actually had been concerned at that time about conduct so important as it now tries to portray, surely Respondent would have acted earlier to ensure that the tenure-review process would not be poisoned by any such conduct.

In light of the foregoing objective considerations, viewed in the totality of the considerations enumerated at the outset of this subsection and in preceding subsections, I conclude that Respondent has failed to credibly establish that there were legitimate reasons which would have led to its July and September actions, even if Diekman had not been involved in TAFC-related activities toward which Respondent had been antagonistic. To the contrary, a preponderance of the credible evidence establishes that but for the effort to secure separate representation of adjunct music faculty and for TAFC's effort to involve the FAC, both statutorily protected activities in the circumstances, Kelly would not have recommended discipline for Deichert, Diekman, and Kodner and, further, McKinsey would not have conducted individual meetings with each one as a basis for determining whether or not to extend contracts to each of them for the 1996–1997 academic year.

Those conclusions, however, do not conclude analysis of Respondent's asserted motivation for refusing to continue employing Diekman. Left for consideration is the question of whether his conduct during the meeting on September 5, 1996, reviewed in section I,L, supra, provided an independent legitimate reason for not continuing to employ Diekman. As to that meeting, there are three aspects which must be evaluated.

First, is the position in which an employee would naturally feel placed by having to participate in such a meeting. As Respondent concedes, the meetings with all three TAFC-supporters had been conducted as a basis for determining whether or not to continue employing them. Only TAFC-activists were summoned to such meetings. It was unprecedented to require adjunct faculty to submit to such meetings as a condition of determining whether or not to continue employing them. The primary activities criticized during those meetings—indeed, the only ones with regard to Deichert—had been one which are protected by Section 7 of the Act, as concluded in subsection A, above. In such circumstances, an employee would naturally be apprehensive at having to participate in a meeting of that type with his/her employer.

True, Section 7 of the Act "does not protect all concerted activities," *NLRB v. Washington Aluminum Co.,* supra, and, based on the Court's discussion in that case, "there is a point when even activity ordinarily protected by Section 7 of the Act is conducted in such a manner that it becomes deprived of protection that it otherwise would enjoy." *Indian Hills Care Center*, 321 NLRB 144, 151 (1996). See also *Earle Industries v. NLRB*, 75 F.3d 400 (8th Cir. 1996). Nevertheless, in *NLRB v. Vought Corp.*, 788 F.2d 1378 (1996), the United States Court of Appeals for the Eighth Circuit agreed that "an employer may not rely on employee conduct that it has unlawfully provoked as a basis for disciplining an employee." At. 1384. See also *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1509 (8th Cir. 1993). Having been compelled to attend a meeting which naturally would have given rise to apprehension of retaliation for having engaged in statutorily protected activity, an employee's defensive reactions—and, even, sometimes rude responses—cannot simply be relied on by his/her employer as a basis for adverse action.

Beyond that, secondly, by choosing to include TAFC's memorandum to the FAC, as one area for criticizing Diekman on September 5, McKinsey effectively chose to inject herself into a the dispute between TAFC and Respondent which was encompassed by that memorandum. As pointed out in section I,A, supra, the FAC is one method which exists to resolve dis-

putes between Respondent and its faculty. Deichert, Diekman and Kodner are the elected officials of TAFC. In consequence, discussions with them concerning the disputes encompassed by TAFC's memorandum to the FAC are evaluated under the Act according to a principle not ordinarily present in exchanges between employees and their employer.

For, disputes resolution procedures inherently require "a free and frank exchange of views, and . . bruised sensibilities may be the price expected for industrial peace." *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 731 (5th Cir. 1970). In such a context, even sometimes insubordinate and other times rude conduct by employees must be tolerated by their employers. *Earle Industries v. NLRB,* supra at 400.

Accordingly, given the context of the September 5 meeting which Respondent obliged Diekman to attend, and given further the obvious central role of TAFC's memorandum to the FAC during that meeting, Respondent now can hardly complain that sometimes insubordinate and other times rude words by Diekman served, of themselves, to deprive him of the Act's protection as the discussion evolved during that meeting. To the extent that his metaphor—"perfume on a pig"—and his admitted two off-color remarks—"pissed off" and "farting around"—may have offended, their use by Diekman in the circumstances of the September 5 meeting amounts to no more than salty language. "A certain amount of salty language or defiance will be tolerated" in the disputes resolution phase of the overall bargaining process. *American Telephone & Telegraph Co. v. NLRB*, 521 F.2d 1159, 1161 (2d Cir. 1975). In that regard, it should not be overlooked that, by summer of 1996, Respondent had agreed to recognize TAFC, as described in section I,D, supra.

To be sure, Respondent is not a manufacturing facility where profanity is a common feature of communication among employees and between employees and their supervisors, at least so far as the record shows. Still, in light of the considerations reviewed in section I,.L, supra, and my general credibility evaluation, I do not credit the testimony that Diekman has used the "f" word during the September 5 meeting nor, even, the word "damn". The metaphor and the two off-color phrases which he did use were not so inherently profane that, in the circumstances, they exceeded the protection of the Act. After all, they were uttered in a meeting with the dean of the college, the chairman of the music department and a member of the FAC; they were not uttered in the presence of students nor other faculty. Cf. *Earle Industries v. NLRB,* supra. They were not used as adjectives, to describe anyone who was present. Rather, they were used in the course of argument during a meeting convened at Respondent's request. In the totality of the circumstances, Diekman's use of those two phrases and the metaphor cannot be said to have deprived him of the Act's protection.

Third, an employee could be rendered unfit for continued employment were that employee to refuse to observe legitimately imposed work rules in the future. In essence, that is one of Respondent's contentions—that Diekman had refused to acquiesce in a commitment to behave in a manner acceptable to Respondent in the future. Yet, the matter is not so straightforward a situation as Respondent seeks to portray it.

During the September 5 meeting, Diekman was criticized for conduct in five areas. Two of them pertained to activity protected by the Act, in connection with which Diekman had done nothing to strip that activity of the Act's protection, as concluded in subsection A, above. The other three areas were pretexts, as concluded above, and were obviously so to Diekman, given the relative staleness of some of them, the lack of investigation of others, and the absence of a meaningful opportunity afforded to him to refute or, at least, explain what had occurred. The commitments sought of him did not differentiate between those three areas and the two areas which were protected by the Act. Rather, only general commitments—according to McKinsey's notes, "professionalism and his obligations to the department" and "professional behavior", as well as "to participate constructively in the department"—were demanded of Diekman. There was no way, viewed from an employee's perspective, that acquiescence in such generalized demands would not leave an employee believing that he/she was being asked to obligate himself/herself to forego at least some statutorily protected activity in the future.

In fact, having observed the witnesses, I am convinced that McKinsey had deliberately phrased those commitments as generalities—to secure acquiescence in foregoing activity protected by the Act, without actually saying anything that could later be used to show that she was doing so. Respondent's officials are educated people. They appeared fully capable of expressing themselves with precision. If McKinsey and Kelly had wanted Diekman—or, for that matter, Deichert and Kodner—to forego particular misconduct, they had merely to say so. The fact that this did not occur—that commitments were phrased as generalities, rather than in specific terms – is a further indication of Respondent's unlawful motivation.

In that respect, it should be noted that, in fact, Diekman had made some specific commitments during the September 5 meeting. It is admitted that he had professed loyalty to his students. Given the emphasis that Respondent places upon faculty commitment to students, that profession of loyalty toward his students would seem to be the very type of commitment which Respondent now argues had been sought from, but not extended by, Diekman. Moreover, as described in section I,.L, supra, it is undisputed that Diekman had denied using lesson time to discuss extraneous subjects with students and, further, had said specifically that he followed Respondent's policy, as outlined during his January 30 meeting with McKinsey, described in sections I,D and H, supra, whenever a student complained to him about another faculty member. Given those statements, it is difficult to conclude, as Respondent's witnesses asserted, that Diekman had been unwilling to make commitments necessary to render him fit for continued employment.

True, he had said only that he felt loyalty to faculty who elected him to TAFC. Yet, there is no evidence that Respondent has a policy whereby its faculty must profess loyalty to each other as a condition of continued employment. Indeed, there is no evidence that Respondent made any effort to obtain a profession of loyalty from the faculty member whom Kodner accused of having spread false rumors about him (Kodner), as described in section I,.L, supra. Moreover, as pointed out above, it would seemingly be more important that if loyalty was expected toward anyone at Respondent, it would be expected toward students and Diekman made that commitment on September 5.

In sum, neither the language used by Diekman, nor his failure to acquiesce in so broad and ambiguous a commitment as was sought of him by Respondent, served to deprive him of the Act's protection on September 5, 1996. To the contrary, I con-

clude that Respondent's efforts to compel him to acquiesce in generalized and ambiguous commitments were intended to compel Diekman to modify, if not abandon, activity on behalf of TAFC and its representation of only adjunct music faculty.

One final point should not be left out. As the September 5 meeting neared conclusion, Diekman expressed a lack of desire to continue working for Respondent. By that point, however, he had been subjected to criticism for his statutorily protected activity and had been criticized for other conduct which obviously was sometimes stale, other times uninvestigated, occasionally inaccurate, and, for the most part, consisted of accusations to which he had not been afforded a meaningful opportunity to respond. In such a situation, it would not be surprising for an employee to express reluctance to continue working for an employer resorting to such conduct.

Still, as that discussion progressed, Diekman did modify his expressed desire not to continue working for Respondent. Further, neither McKinsey nor Kelly claimed that they had regarded Diekman's statements as representing an announcement that he was quitting. To the contrary, it is undisputed that it had been Respondent, not Diekman, who had severed the employment relationship between them. Consequently, there is no basis for concluding that Diekman had quit on September 5, nor that Respondent had regarded him as having quit.

The fact that neither Deichert nor Kodner were denied continued employment is not so inherently a dispositive consideration as was portrayed. A refusal to continue employing even "a single dissident may have-and may be intended to have-an *in terrorem* effect on others," (citation omitted), *Rust Engineering Co. v. NLRB*, 445 F.2d 172, 174 (6th Cir. 1971), for that action serves to "warn [other] employees that [their employer does] not look favorably upon" aspects of their statutorily protected activity. *Northway Nursing Home*, 243 NLRB 544 fn. 1 (1979). Beyond that, so far as the evidence shows, both Deichert and Kodner knuckled under to Respondent's generalized demands. Only Diekman bridled at doing so, with the result that only he refused to abandon TAFC-related activity and, as a result, was denied further employment as a result.

Therefore, I conclude that a preponderance of the credible evidence establishes that Karl Diekman had engaged in activity protected by the Act, that Respondent had harbored animus toward him because of some aspects of that protected activity, that Respondent acted upon that animus in refusing to extend a contract to Diekman for the 1996–1997 academic year, and that Respondent's true motivation was not based upon any activity by Diekman which can be said to be not encompassed by the Act's protection or which exceeded the protection of the Act. As a result, Respondent violated Section 8(a)(3) and (1) of the Act.

CONCLUSION OF LAW

Carleton College has committed an unfair labor practice affecting commerce by refusing to extend a contract to Karl Diekman for the 1996–1997 academic year because of Diekman's support for separate representation of adjunct music faculty and because of at least some of his activity on behalf of the Adjunct Faculty Committee, a statutory labor organization, in violation of Section 8(a)(3) and (1) of the Act.

REMEDY

Having concluded that Carleton College has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to, within 14 days from the date of this Order, offer Karl Diekman full reinstatement to the same position of adjunct music faculty member which was denied him on September 9, 1995, dismissing, if necessary, anyone who may have been hired or assigned to perform that job after September 9, 1996. If that job no longer exists, Diekman will be offered employment in a substantially equivalent position, without prejudice to seniority or other rights and privileges which he would have enjoyed had he not been unlawfully denied continued employment. Moreover, it shall make Diekman whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on amounts owing, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). It also shall, within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to extend a contract to Diekman for the 1996-1997 academic year, and within 3 days thereafter shall notify Diekman in writing that this has been done and that the refusal to extend that contract to him will not be used against him in any way.

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended:[2]

ORDER

The Respondent, Carleton College, Northfield, Minnesota,, its officers, agents, successors, and assigns, shall,

1. Cease and desist from

(a) Refusing to extend annual contracts to Karl Diekman or to any other adjunct faculty member because he/she seeks separate representation for adjunct music faculty or because he/she engages in activity on behalf of the Adjunct Faculty Committee, or on behalf of any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Karl Diekman full reinstatement to the job of adjunct music faculty member which he was denied on September 9, 1996, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges which he would have enjoyed had he been extended a contract for the 1996–1997 academic year.

(b) Make Karl Diekman whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Within 14 days from the date of this Order, remove from its files any reference to the refusal to extend Karl Diekman a contract for the 1996–1997 academic year, and within 3 days thereafter notify Diekman in writing that this has been done.

(e) Within 14 days after service by the Region, post at its Northfield, Minnesota place of business copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by its duly authorized representative, shall be posted by Carleton College and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Carleton College has gone out of business or closed the Northfield facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since July 16, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to extend annual contracts to Karl Diekman, or to any other adjunct faculty member, because he/she seeks separate representation for adjunct music faculty or because he/she engages in activity on behalf of The Adjunct Faculty Committee (TAFC), or on behalf of any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights protected by the National Labor Relations Act.

WE WILL, within 14 days from the date of this Order, offer Karl Diekman full reinstatement to the same adjunct music faculty member's position which was denied him on September 9,1996, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges which he would have enjoyed had we not unlawfully deprived him of a contract for the 1996–1997 academic year.

WE WILL make whole Karl Diekman for any loss of earnings and other benefits resulting from our unlawful refusal to extend him a contract for the 1996–1997 academic year, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful refusal to extend a contract to Karl Diekman for the 1996-1997 academic year, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that that unlawful act will not be used against him in any way.

CARLETON COLLEGE

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."